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JURISDICTION TO TAX

THE power to tax is one of the attributes of sovereignty; and the jurisdiction to exercise the power is coterminous with the bounds of the sovereign's jurisdiction. "It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. . . . The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission. . . . The power to tax involves the power to destroy." [1] "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business." [2] "The taxing power of the state . . . cannot reach over into any other jurisdiction to seize upon persons or property for purposes of taxation. No officer, however armed by statute or court process of this state, can seize upon [such property] for taxes." [3] A personal tax may be laid upon persons subject to the jurisdiction of the sovereign; a property tax upon all property situated in his territory; an excise or license tax upon all acts done within his boundaries.[4]

The sovereign who has power to tax is that sovereign who by

[1] Marshall, C. J., in M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, 429, 431 (1819).
[2] Field, J., in State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300 (1872).
[3] Emery, J., in Augusta *v.* Kimball, 91 Me. 605, 40 Atl. 666 (1898).
[4] Commonwealth *v.* Standard Oil Co., 101 Pa. 119 (1882).

personal ownership of the territory has the general control of it. Thus where land near the New Jersey shore, under the waters of New York bay, were taxed by New Jersey this tax was held valid, though "exclusive jurisdiction of and over all the waters of the Bay of New York . . . and of and over the land covered by said waters" was by agreement of the two states given to New York, saving to New Jersey "the exclusive property in and to the land under water" on the west side of the bay.[5] Mr. Justice Holmes said that "The boundary line is the line of sovereignty. . . . Boundary means sovereignty since in modern times sovereignty is mainly territorial, unless a different meaning clearly appears." On the other hand, where land within a state is ceded to the United States for federal purposes the complete sovereignty passes away from the state, which can no longer levy taxes within the ceded territory.[6]

If a subject of taxation is within the taxing power of a sovereign, he has full power to tax it, irrespective of what has been done by another sovereign. Thus the fact that property within the jurisdiction has paid a tax for the same year to another sovereign does not in any way affect the right of the former sovereign to tax it;[7] nor does an exemption granted by another sovereign withdraw the subject of taxation from his power.[8]

The method of taxation now almost universally adopted is to levy a tax annually, payable usually in money, but now and then in labor, as in the case of a "road-tax." The day on which the tax is levied is fixed by the sovereign at his will; and on that day he levies a tax based upon his needs for a year. It may of course happen that a person is domiciled within one state on its taxing day, or property is then situated there, and is therefore liable to be taxed there, and that the domicile of the person or situs of the property is then changed to another state before its taxing day, so that the new sovereign also has a right to levy the tax. The right

[5] Central R. R. *v.* Jersey City, 209 U. S. 473 (1908), affirming s. c. 70 N. J. L. 81, 56 Atl. 239 (1903); 72 N. J. L. 311, 61 Atl. 1118 (1905) followed; Leary *v.* Jersey City, 208 Fed. 854 (1913).

[6] Commonwealth *v.* Clary, 8 Mass. 72, 77 (1811) (*semble*).

[7] Coe *v.* Errol, 116 U. S. 517 (1886); Shaw *v.* Hartford, 56 Conn. 351, 15 Atl. 742 (1888); Hudson *v.* Miller, 10 Kan. App. 532, 63 Pac. 21 (1900); General Electric Co. *v.* Board of Assessors, 121 La. 116, 46 So. 122 (1908); Winkley *v.* Newton, 67 N. H. 80, 36 Atl. 610 (1891); Crosby *v.* Charlestown (N. H.), 95 Atl. 1043 (1915); State *v.* Fidelity & Deposit Co., 35 Tex. Civ. App. 214, 80 S. W. 544 (1904).

[8] Bonaparte *v.* Appeal Tax Court, 104 U. S. 592 (1881).

of the second sovereign to tax is not abridged by the fact that a tax is due to the other.[9]

In the United States the power of a state to tax has been greatly affected by the Constitution of the United States. With constitutional questions as such we are not here concerned. In so far, however, as the Constitution is merely confining a state within the boundaries of its jurisdiction, a decision based upon the Constitution is quite in point on the question, how far does the jurisdiction of the state extend. In fact, the interpretation of several constitutional limitations, and particularly of the Fourteenth Amendment in its bearing on the taxing power, is merely an exposition of the legal requirement of jurisdiction to tax. When this is the case, decisions upon the constitutionality of tax laws will be freely used as authorities in determining the legal jurisdiction to tax.

I. Personal Tax

A sovereign may impose upon everyone domiciled within his territory a personal tax, which is "the burthen imposed by government upon its own citizens for the benefits which that government affords by its protection and its laws." [10] Any domiciled person is subject to this tax, though he may be an alien [11] or a corporation.[12] The tax may be a poll-tax of fixed amount, a tax based to some extent upon wealth,[13] or a tax payable in labor.[14]

No sovereign may lay a personal tax upon a person or corporation not domiciled within his territory.[15] For this reason he cannot impose upon such a nonresident a personal obligation to pay a tax levied upon property within the territory. Land or a chattel within the territory is subject, as has been seen, to the taxing

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[9] Spaulding Mfg. Co. *v.* Kendall, 19 Okla. 345, 91 Pac. 1031 (1907).

[10] Green, C. J., in State *v.* Ross, 23 N. J. L. (3 Zab.) 517, 521 (1852).

[11] Frantz's Appeal, 52 Pa. 367 (1866); Kuntz *v.* Davidson County, 6 Lea (Tenn.) 65.

[12] The Delaware Railroad Tax, 18 Wall. (U. S.) 206 (1873).

[13] The Delaware Railroad Tax, 18 Wall. (U. S.) 206, 231 (1873), per Field, J.: "The State may impose taxes upon the corporation as an entity existing under its laws. . . . And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion." See also Elmer, J., in State *v.* Bentley, 23 N. J. L. (3 Zab.) 532 (1852).

[14] On Yuen Hai Co. *v.* Ross, 8 Sawy. (U. S.) 384, 14 Fed. 338 (1882).

[15] *Ibid.*; Boston Investment Co. *v.* Boston, 158 Mass. 461, 33 N. E. 580 (1893); State *v.* Ross, 23 N. J. L. (3 Zab.) 517 (1852).

power although the owner is absent, and a tax laid upon such property may be enforced *in rem*,[16] but the tax cannot be made a personal obligation of the owner, upon whom the sovereign has no jurisdiction to impose an obligation.

This principle has been forcibly stated by the courts. Thus, in *Dewey* v. *Des Moines*,[17] Mr. Justice Peckham said:

"The State may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretence proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. . . . The jurisdiction to tax exists only in regard to persons and property, or upon the business done within the State, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question."

The language of Judge Rumsey in *New York* v. *McLean* [18] was equally clear and forcible:

"No one will claim that any law of this State can have any extra-territorial force, or affect in any way the status of a non-resident, or impose any personal liability upon him. So that, when this tax was assessed in the year 1896 it certainly put no personal duty upon the defendant to pay it. It was only effectual then as a lien upon the property taxed. . . . Although a State has the power to levy a tax upon personal property of a non-resident situated within its boundaries and subject to its jurisdiction, and for that purpose may separate the situs of the owner from the actual situs of the property within the State, and subject it to taxation because it is within the State, yet it can only enforce the payment of that tax by virtue of its jurisdiction over the property and it has not by virtue of that jurisdiction any power to subject the owner of it to a personal liability for the tax."

Since a personal tax may be laid upon a resident, graduated upon his wealth, it was possible at common law to include in such a tax the value of his foreign chattels.[19] This power was often rested upon the fiction that movable property is situated at the

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[16] Paddell *v.* New York, 211 U. S. 446 (1908).

[17] 173 U. S. 193, 202, 203 (1899).

[18] 57 N. Y. App. Div. 601, 606–09, 68 N. Y. Supp. 606 (1901).

[19] Baltimore *v.* Western Maryland R. R., 50 Md. 274 (1878); Bemis *v.* Boston, 14 Allen (Mass.) 366 (1867); Commonwealth *v.* Pennsylvania Coal Co., 197 Pa. 551 (1901); Norfolk & Western Ry. *v.* Board of Public Works, 97 Va. 23, 32 S. E. 779 (1899).

domicile of the owner, *mobilia sequuntur personam*,[20] but the true nature of the tax, as in reality a personal tax, was well recognized; "the proceeding is personal only." [21] In some states foreign chattels were not included in the tax laid upon a resident, but this was because the court found such to be the legislative will.[22]

While a resident was thus often taxed on the value of his foreign chattels, it is universally agreed that the value of foreign land can never enter into taxation.[23] The immovable nature of land and the impossibility of conceiving of it as "attached to the person" sufficiently justify the distinction in this respect between land and chattels; but the absence of a logical distinction finally influenced the Supreme Court of the United States to hold that a state cannot, in accordance with due process of law, tax its own corporation upon the value of its chattels permanently situated outside the state.[24]

In his case the Union Refrigerator Transit Company was a Kentucky corporation, owning cars which were used on railroads throughout the United States; a small proportion only being used in Kentucky. The Court of Appeals of Kentucky ordered the taxation of all the cars; but this was reversed in the Supreme Court of the United States. In the argument for the Commonwealth it was argued that "the laws of that State protect such domestic corporation, the person of the owner of such property, and, as a consideration for such protection, that State is entitled to tax all of its personal property, because it is a creature of the laws of that State." The court, however, regarded the cases which supported this contention as based on the outworn maxim, *mobilia sequuntur personam*, and did not deem the principle suggested as worthy of direct discussion.

The gist of Mr. Justice Brown's argument was this: The power of taxation is based upon the assumption of an equivalent rendered

[20] "Part of his general estate attached to his person." Bradley, J., in Coe *v.* Errol, 116 U. S. 517 (1886).

[21] Agnew, J., in McKeen *v.* Northampton, 49 Pa. 519 (1865). The opinion proceeds: "Though different kinds of property are specified as the subjects of taxation, it is not as a proceeding *in rem*, but only as affording the means and measure of taxation. The tax is assessed personally."

[22] Hoyt *v.* Commissioners of Taxes, 23 N. Y. 224 (1861).

[23] Bittinger's Estate, 129 Pa. 338, 18 Atl. 132 (1889).

[24] Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194 (1905). Fuller, C. J., and Holmes, J., dissenting.

to the taxpayer; and the taxation of property without such an equivalent is a taking of property without due process of law. No property can be taxed which is not within the territorial jurisdiction of the taxing power. The most familiar example is that of land; and no legislature has assumed to place a tax on foreign land. But the argument against taxing foreign property applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. There is an obvious difference between tangible and intangible property, in the fact that the latter is held secretly; there is no method by which its existence or ownership can be ascertained in the state of its situs; and if the owner be discovered, there is no way in which he can be reached there by process. Tangible property is visible.

Mr. Justice Holmes, in a dissenting opinion, said:

"It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment."

It is indeed difficult to prove that a practice which had prevailed in half the states of the Union for a century was contrary to due process of law. The few authorities cited by the court as supporting the decision are easily distinguishable. The court did not even notice the true nature of the tax, as a personal tax, not a tax on property, and in the actual case a tax on an artificial person, owing its very existence and its right to hold its property to the taxing state.

It was soon held that the doctrine of this case does not apply to a chattel having no taxable situs elsewhere, like a vessel [25] or a freight car,[26] which, though having no situs within the owner's domicile, is never permanently enough in any other state to be taxed there; and by the very terms of *Union Refrigerator Transit Co.* v. *Kentucky* it does not apply to intangible property.[27] The ground of distinction between cases where a tax upon the owner could, and where it could not, take into account personal property

[25] Southern Pacific Co. *v.* Kentucky, 222 U. S. 63 (1911).

[26] New York Central R. R. *v.* Miller, 202 U. S. 584 (1906).

[27] "There is an obvious distinction between the tangible and intangible property. . . . The latter . . . may be taxed at the domicil of the owner," per Brown, J.

not situated within the state of his domicile, evidently was that in the one class of cases the property was not findable and taxable elsewhere, and in the other class of cases it could be found and was taxable in another state.

There exists, however, as will be explained, a doctrine that certain intangible things may be taxed as property situated in a certain place, and thus subject to the taxing power of the sovereign, on the ground that they have a "business situs" there. A bank deposit used in the business has such a business situs, and may be taxed where the business is carried on and the deposit made. Yet in the recent case of *Fidelity & Columbia Trust Co.* v. *Louisville*[28] it was held that such a deposit might be included in the tax laid upon the depositor at his domicile; Mr. Justice Holmes remarking that the principle of *Union Refrigerator Transit Co.* v. *Kentucky* had not been pressed so far by the court.

As a result of this decision it would seem that under no circumstances will the doctrine of *Union Refrigerator Transit Co.* v. *Kentucky* be applied to a tax on intangible property, whether the property has a business situs or is for any other reason under the taxable control of a state other than that of the owner's domicile; but that the personal tax laid upon the owner at his domicile may include a tax upon all his intangible property, of whatever nature.

II. Land Tax

A state may levy a tax on all land situated within its boundaries.[29] The fact that the land is the property of a nonresident does not withdraw it from the taxing power of the sovereign of situs.[30] Any interest in the land may be taxed to the owner of the interest; such as the interest of a mortgagor or mortgagee, or the interest of a lessee. So of any incorporeal hereditament, or any privilege connected with the land. Thus where a corporation received a lease of certain land for the purpose of sinking oil-wells in it, and then assigned the lease to an individual, on consideration of receiving a certain percentage of the oil produced, this rental in

[28] 245 U. S. 54 (1917).

[29] Witherspoon *v.* Duncan, 4 Wall. (U. S.) 210 (1866); Central R. R. *v.* Jersey City, 70 N. J. L. 81, 56 Atl. 239 (1903).

[30] Mt. Sterling O. & G. Co. *v.* Ratliff, 127 Ky. 1, 104 S. W. 993 (1907); State *v.* Ross, 26 N. J. L. (2 Dutch.) 224 (1857); People *v.* Dunckel, 69 N. Y. Misc. 361, 125 N. Y. Supp. 385 (1910).

kind was taxable to the corporation.[31] On the other hand, the predominant owner, for instance the mortgagor, may be taxed not on the value of his interest, but on the entire value of the land;[32] the person to whom the land is taxed is immaterial, so far as the validity of the tax lien is concerned.[33]

A franchise appurtenant to land may be taxed as an interest in the land, and is taxable where the land lies to which it is appurtenant. Thus a franchise to construct a bridge may be taxed as appurtenant to the shore from which the bridge is allowed to be extended.[34] A ferry franchise is taxable by the state from whose shore the ferry is allowed to run,[35] and cannot be taxed by another state, for instance, the state which controls the opposite bank but has not granted the franchise.[36] It follows that in the case of an interstate bridge or ferry, which is in fact attached to two opposite shores, the sovereign of either shore might grant and tax a franchise.

Land outside the boundaries of the state is of course not subject to taxation.[37] It has therefore been held that in taxing an aggregate mass of property, such as the capital of a corporation, foreign real estate must be omitted.[38]

An apparent difference of opinion has developed on the taxation of a debt secured by a mortgage of land.

It is usually held that the debt, being the principal thing, fixes the nature of the thing to be taxed; that it has no situs where the security is, and is taxable only through power over the owner. It is therefore not subject to taxation in the state where the mortgaged land lies, if the owner is a nonresident of the state;[39] and

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[31] Mt. Sterling O. & G. Co. *v.* Ratliff, 127 Ky. 1, 104 S. W. 993 (1907).

[32] Faxton *v.* McCosh, 12 Ia. 527 (1861); Paddell *v.* New York, 211 U. S. 446 (1908).

[33] Witherspoon *v.* Duncan, 4 Wall. (U. S.) 210 (1866).

[34] Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150 (1897).

[35] Conway *v.* Taylor, 1 Black (U. S.) 603 (1861).

[36] Louisville & J. F. Co. *v.* Kentucky, 188 U. S. 385 (1903).

[37] Winnipiseogee, L. C. & W. M. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849 (1887).

[38] People *v.* Barker, 23 N. Y. Misc. 188, 51 N. Y. Supp. 102 (1897); Commonwealth *v.* American Dredging Co., 122 Pa. 386, 15 Atl. 443 (1888).

[39] Territory *v.* Gila County Delinquent Tax List, 3 Ariz. 179, 24 Pac. 182 (1890); People *v.* Eastman, 25 Cal. 601 (1864); Arapahoe County *v.* Cutter, 3 Colo. 349 (1877); Foresman *v.* Byrns, 68 Ind. 247 (1879); Senour *v.* Ruth (Ind.), 39 N. E. 946 (1895); Theobald *v.* Clapp, 43 Ind. App. 191, 87 N. E. 100 (1909); Faxton *v.* McCosh, 12 Ia. 527 (1861); Davenport *v.* Mississippi & Mo. R. R., 12 Ia. 539 (1861); State *v.* Smith, 68 Miss. 79, 8 So. 294 (1890); Adams *v.* Colonial & U. S. Mortgage Co., 82 Miss. 263, 34 So. 482 (1903); Holland *v.* Commissioners of Silver Bow County,

conversely notwithstanding the situs of the land, it may be taxed at the domicile of the owner.[40]

Yet the conveyance of the land in mortgage is the creation of an interest in land, whether we call that interest the legal ownership, subject to an equity of redemption, or a mere lien on the land for security. The land itself being within the taxing power of the sovereign of situs, it is doubtless within his power to tax each interest in the land, if he prefers this to taxing the entire body of such interests once for all in the name of the owner of the predominant interest. A tax on the interest of the mortgagee is therefore within the jurisdiction of the sovereign of situs.[41]

In *Kinney* v. *Treasurer & Receiver General*[42] Knowlton, C. J., said:

"Under the laws of Massachusetts a mortgagee takes not merely a lien upon the land as security, but he holds the legal title to it, subject to a right of redemption in the mortgagor. The interest of the mortgagee is made subject to taxation by our statutes, and the property taxable to the mortgagor is diminished by a deduction of the value of the interest held by the mortgagee. . . . While, for general purposes the interest of the mortgagee is treated as personal property, it has a local situs, and carries with it an ownership of the land until it is redeemed by the payment of the debt in performance of the condition. The debt, which is the obligation of the debtor to pay, and the land, which is the security for the payment of the debt, are individual parts of a single valuable property in the mortgagee, which may be made available in different ways. . . . The same doctrine has been held in States where the mortgagee has only a lien upon real estate. . . . The fact that the

15 Mont. 460, 39 Pac. 575 (1895); State *v.* Earl, 1 Nev. 394 (1865); Crispin *v.* Vansyckle, 49 N. J. L. 366, 8 Atl. 120 (1887); People *v.* Smith, 88 N. Y. 576 (1882); Matter of Preston, 75 App. Div. 250, 78 N. Y. Supp. 91 (1902); Grant *v.* Jones, 39 Ohio St. 506 (1883); Myers *v.* Seaberger, 45 Ohio St. 232, 12 N. E. 796 (1887).

[40] Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696 (1896); Kirtland *v.* Hotchkiss, 42 Conn. 426 (1875), 100 U. S. 491 (1879); Darcy *v.* Darcy, 51 N. J. L. 140, 16 Atl. 160 (1888); Bullock *v.* Guilford, 59 Vt. 516, 9 Atl. 360 (1887).

[41] Savings & Loan Society *v.* Multnomah County, 169 U. S. 421 (1898); Frankfort *v.* Fidelity T. & S. V. Co., 111 Ky. 667, 64 S. W. 470 (1901) (*semble*); Allen *v.* National State Bank, 92 Md. 509, 48 Atl. 78 (1901); Kinney *v.* Treasurer and Receiver General, 207 Mass. 368, 93 N. E. 586 (1911); Common Council of Detroit *v.* Assessors, 91 Mich. 78, 51 N. W. 978 (1892); *In re* Merriam, 147 Mich. 630, 111 N. W. 196 (1907); Susquehanna Canal Co. *v.* Commonwealth, 72 Pa. 72 (1872); Mumford *v.* Sewall, 11 Ore. 67, 4 Pac. 585 (1883).

[42] 207 Mass. 368, 93 N. E. 586 (1911).

laws of the State and the jurisdiction of its courts must be invoked for the preservation and enforcement of rights under the mortgage is an important consideration leading to this result."

The reconciliation of these cases must be sought in the form of the taxing statute. If there is no special statute, only the ordinary provision for taxing all real and personal property within the state, the courts, following the ordinary practice and the provisions of the common law, will tax the land at its full value as the property of the mortgagor, since he owns the predominant, though not necessarily the largest, interest in it. The land having been once taxed at its full value, there is nothing left to tax except the debt it secures; and if the debt is due to a nonresident it is not within the jurisdiction. But by an express statutory provision dividing the land for purposes of taxation between the mortgagor and mortgagee, it is possible for the sovereign to tax the interest of the nonresident mortgagee in the land, though the debt itself cannot be reached. This doctrine is very clearly set out in the opinion of Mr. Justice Gray in *Savings & Loan Society* v. *Multnomah County*.[43] In that case a statute of Oregon provided that a mortgage, whereby land was made security for a debt, should be taxed as land. In several decisions in the state and federal courts a tax levied under this statute had been held valid;[44] and these decisions were followed in the Supreme Court. Mr. Justice Gray said:

"The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicil; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs."

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[43] 169 U. S. 421, 427 (1898), disapproving a *dictum* to the contrary effect in State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300 (1872).

[44] Mumford *v.* Sewall, 11 Ore. 67, 4 Pac. 585 (1883); Dundee Mortgage Co. *v.* School District, 10 Sawyer (U. S.) 52 (1884); Crawford *v.* Linn County, 11 Ore. 482, 5 Pac. 738 (1884); Dundee Mortgage Co. *v.* Parrish, 11 Sawy. (U. S.) 92 (1885); Poppleton *v.* Yamhill County, 18 Ore. 377, 23 Pac. 253 (1890); Savings & Loan Society *v.* Multnomah County, 60 Fed. 31 (1894).

In many other cases cited by the appellant there was no statute expressly taxing mortgages at the situs of the land; and although the opinions in some of them took a wider range, the only question in judgment in any of them was one of the construction, not of the constitutionality, of a statute — of the intention, not of the power, of the legislature.

Since in taxing the mortgage the state is taxing an interest in the land, it seems clear that the mortgagor's tax can only cover the value of the equity of redemption; the sum of the taxes assessed against the interests of the two cannot exceed the amount of the tax on the land itself. This is in most of the cases insisted upon as a condition of validity;[45] and a contrary intimation[46] must be regarded as unsound.

III. Tax on Chattels

A sovereign has jurisdiction over every chattel situated within his territory, and may therefore lay a tax upon it although the owner is not domiciled within the territory,[47] and even though it is in the hands of a lessee.[48] The jurisdiction is based on the power over the *res;* and though it may as a matter of form be assessed "to the owner" it is collectible only out of the assets,[49] and will not support a personal action against the nonresident owner.

A few states do not, unless a statute expressly so provide, tax the chattels of a nonresident owner.[50] On the other hand, a few

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[45] Savings & Loan Society *v.* Multnomah County, 169 U. S. 421 (1898); Kinney *v.* Treasurer & Receiver General, 207 Mass. 368, 93 N. E. 586 (1911); Common Council of Detroit *v.* Assessors, 91 Mich. 78, 51 N. W. 787 (1892).

[46] In Allen *v.* National State Bank, 92 Md. 509, 48 Atl. 78 (1901).

[47] Coe *v.* Errol, 116 U. S. 517 (1886); McCutchen *v.* Rice County, 2 McCrary (U. S.) 337, 7 Fed. 558 (1881); Mills *v.* Thornton, 26 Ill. 300 (1861); Rieman *v.* Shepard, 27 Ind. 288 (1866); Hudson *v.* Miller, 10 Kan. App. 532, 63 Pac. 21 (1900); Hull *v.* Johnson, 10 Kan. App. 565, 63 Pac. 455 (1901); Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 44 La. Ann. 760, 11 So. 91 (1892); Scollard *v.* American Felt Co., 194 Mass. 127, 80 N. E. 233 (1907); Tobey *v.* Kip, 214 Mass. 477, 101 N. E. 998 (1913); McCormick *v.* Fitch, 14 Minn. 252 (1869); State *v.* William Deering Co., 56 Minn. 24, 57 N. W. 313 (1893); Winkley *v.* Newton, 67 N. H. 80, 36 Atl. 610 (1891); John Hancock Ice Co. *v.* Rose, 67 N. J. L. 86, 50 Atl. 364 (1901); Matter of King, 30 N. Y. Misc. 575, 63 N. Y. Supp. 1100 (1900); People *v.* Dunckel, 69 N. Y. Misc. 361, 125 N. Y. Supp. 385 (1910).

[48] Lamson C. S. S. Co. *v.* Boston, 170 Mass. 354, 49 N. E. 630 (1898).

[49] Scollard *v.* American Felt Co., 194 Mass. 127, 80 N. E. 233 (1907).

[50] Phelps *v.* Thurston, 47 Conn. 477 (1880); Leonard *v.* New Bedford, 16 Gray

states, at common law, refuse to tax chattels in other states belonging to residents, but confine taxation of chattels to those actually situated within the state.[51]

Not every chattel which happens to be within the limits of the sovereign's territory can be regarded as *situated* there. A chattel merely temporarily within those limits is not, at common law, subject to the ordinary property tax, nor can one of the United States by statute subject such a chattel to taxation, since to do so would contravene due process of law.

The leading case is *Hays* v. *Pacific Mail S. S. Co.*,[52] where it was held that a vessel, found at a port of call in California on the taxing-day but registered outside the state, was not subject to taxation. This principle has been extended to all kinds of chattels passing through a state.[53]

The reason is clear. The tax is levied in return for a year's protection; it is known that this particular chattel will require protection only for a short time. To exact a tax based on a year's protection would be unfair; no other tax is provided for by the law. If there were provision for a daily tax this could lawfully be exacted even from property temporarily within the state, for such property is of course within the jurisdiction of the sovereign. Any method provided by statute for exacting a really fair tax from such property is constitutional.[54]

Promissory notes and bonds, being things of value in themselves, salable in the market and passing freely from hand to hand, have a real situs, and are taxable in any state in which they are permanently located,[55] and are not taxable elsewhere in a

(Mass.) 292 (1860); Tobey *v.* Kip, 214 Mass. 477, 101 N. E. 998 (1913) (*semble*); Commonwealth *v.* Pennsylvania Coal Co., 197 Pa. 551, 47 Atl. 740 (1901).

[51] Colbert *v.* Board of Supervisors, 60 Miss. 142 (1882); State *v.* Rahway, 24 N. J. L. (4 Zab.) 56 (1853); Hoyt *v.* Commissioners of Taxes, 23 N. Y. 224 (1861).

[52] 17 How. (U. S.) 596 (1854).

[53] For a full collection of the cases on this point see an article by the author in the current volume of the YALE LAW JOURNAL.

[54] Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S. 18 (1890).

[55] Bonaparte *v.* Tax Court, 104 U. S. 592 (1881); New Orleans *v.* Stempel, 175 U. S. 309 (1899); Blackstone *v.* Miller, 188 U. S. 189 (1903), 23 Sup. Ct. Rep. 277, 439; Buck *v.* Miller, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8 (1897); Callahan *v.* Woodbridge, 171 Mass. 595, 51 N. E. 176 (1898); State *v.* St. Louis County Court, 47 Mo. 594 (1871); People *v.* Ogdensburgh, 48 N. Y. 390 (1872); Matter of Gibbs, 60 N. Y. Misc. 645, 113 N. Y. Supp. 939 (1908); People *v.* Roberts, 25 App. Div. 16, 49 N. Y. Supp. 10 (1898); Matter of Tiffany, 143 App. Div. 327, 128 N. Y. Supp. 106

state which does not tax tangible property at the owner's domicile.[56] So where by statute a foreign insurance company is required to deposit bonds with the State as a condition of doing business, the bonds are taxable where deposited.[57] Here, as everywhere, however, bonds or notes situated only temporarily within the state are not taxable.[58]

There is no little recent authority holding that a certificate of stock is in the same class as a bond, and is taxable where it is found, though both the stockholder and corporation are non-resident. "They may be treated as property from the function they perform and the use that is made of them." [59]

Mr. Justice Wright in *Stern* v. *Queen* [60] said in such a case:

"There is in this country . . . a document the existence of which vouches and is necessary for vouching the title of some one to the foreign share, so that in the absence of that document no one at all could establish a title to the share. It is found by the case that the certificates are currently marketable here as securities for that share, and the dividends payable on that share; it is found, in fact, that the delivery of the certificate in this country ipso facto affects the title in a sense that it entitles the transferee to all the transferor's rights. It follows that the certificate itself has some operative power here, and it seems to me not to be within the ancient rule that a simple contract debt or mere evidences of a simple contract debt are supposed to exist only at the place of the debtor's residence. It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value."

(1911); Hall *v.* Miller, 102 Texas, 289, 115 S. W. 1168 (1909), affirming 110 S. W. 165 (Tex. Civ. App.) (1908). *Contra*, Howell *v.* Gordon, 127 Mich. 517, 86 N. W. 1042 (1901); Jack *v.* Walker, 79 Fed. 138 (1897); Myers *v.* Seaberger, 45 Ohio St. 232, 12 N. E. 796 (1887).

[56] Wilcox *v.* Ellis, 14 Kan. 588 (1875); Mayor of Baltimore *v.* Hussey, 67 Md. 112, 9 Atl. 19 (1887); State *v.* Howard County Court, 69 Mo. 454 (1879); Leavell *v.* Blades, 237 Mo. 695, 141 S. W. 893 (1911).

[57] Western Assurance Co. *v.* Halliday, 110 Fed. 259 (1901), 127 Fed. 830 (1903); People *v.* Home Insurance Co. 29 Cal. 533 (1866); British C. L. Ins. Co. *v.* Commissioners, 31 N. Y. 32 (1865); State *v.* Fidelity & Deposit Co., 35 Tex. App. 214, 80 S. W. 544 (1904).

[58] Herron *v.* Keeran, 59 Ind. 472 (1877); Matter of Gibbes, 84 App. Div. 510, 83 N. Y. Supp. 53 (1903), affirmed 176 N. Y. 565, 68 N. E. 1117 (1903).

[59] People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970 (1906); Stern *v.* Queen, [1896] 1 Q. B. 211.

[60] [1896] 1 Q. B. 211, 218.

See also cases collected showing the tendency to regard a certificate of stock as tangible property in *Bellows Falls Power Co.* v. *Commonwealth.*[61]

It is sometimes urged that to tax both the capital stock of the corporation and the shares is double taxation; and on this ground it has sometimes been held that the shares of a corporation which has already paid a tax upon its property cannot be taxed where the stockholder is a resident,[62] or even where he is non-resident.[63] But in most cases the distinction between the shares of stock and the property of the company is recognized, and it is held that both may be taxed, each in the proper place.[64]

A policy of insurance is not yet recognized as a chattel in mercantile usage, so as to make it taxable at the place where it is found.[65]

IV. Taxation of Intangible Property

Intangible property has usually no actual situs, and therefore cannot be taxed by any sovereign because of his territorial power over it; it is usually included in the personal tax levied upon the owner of it at his domicile. Indeed, it has been held that no kind of intangible property of a nonresident can be taxed, at least without the aid of a statute specially providing for such a tax.[66]

Certain kinds of intangible property may, however, be taxed locally. A seat in a stock exchange, for instance, is a valuable

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[61] 222 Mass. 51, 109 N. E. 891 (1915).

[62] Strob *v.* Detroit, 131 Mich. 109, 90 N. W. 1029 (1902).

[63] Kintzing *v.* Hutchinson, 7 W. N. C. 226, Fed. Cas. No. 7,834 (1877); San Francisco *v.* Mackay, 10 Sawy. (U. S.) 431, 21 Fed. 539, affirmed 22 Fed. 602 (1884); North Carolina R. R. *v.* Commissioners, 91 N. C. 454 (1884); Union Bank *v.* State, 9 Yerg. (Tenn.) 490 (1836). So of bonds: *In re* Fair, 128 Cal. 607, 61 Pac. 184 (1900); Germania Trust Co. *v.* San Francisco, 128 Cal. 589, 61 Pac. 178 (1900).

[64] Bank of Commerce *v.* Tennessee, 161 U. S. 134 (1895); Jefferson County Sav. Bank *v.* Hewitt, 112 Ala. 546, 20 So. 926 (1896); State *v.* Travelers' Ins. Co., 70 Conn. 590, 40 Atl. 465 (1898); Illinois Nat. Bank *v.* Kinsella, 201 Ill. 31, 66 N. E. 338 (1903); Cook *v.* Burlington, 59 Ia. 251, 13 N. W. 113; Home Insurance Co. *v.* Assessors, 42 La. Ann. 1131, 8 So. 481 (1890); Welch *v.* Burrill, 223 Mass. 87, 111 N. E. 774 (1916); Bellows Falls Power Co. *v.* Commonwealth, 222 Mass. 51, 109 N. E. 891 (1915); Bradley *v.* Bauder, 36 Ohio St. 28 (1880); Providence & W. R. R. *v.* Wright, 2 R. I. 459 (1853); State *v.* Bank of Commerce, 95 Tenn. 221, 31 S. W. 993 (1895); Commonwealth *v.* Charlottesville P. B. & L. Co., 90 Va. 790, 20 S. E. 364 (1894); Second Ward Sav. Bank *v.* Milwaukee, 94 Wis. 587, 69 N. W. 359 (1896).

[65] Matter of Horn, 39 N. Y. Misc. 133, 78 N. Y. Supp. 979 (1902).

[66] Callahan *v.* Singer Mfg. Co., 29 Ky. L. Rep. 123, 92 S. W. 581 (1906).

thing, and is capable of taxation at the place where the exchange is, though owned by a nonresident;[67] and the same thing is true of membership in a produce exchange.[68] Goodwill also may be taxed at the place of business,[69] unless it is held that the tax act excludes it from taxation.[70]

There would seem to be sufficient reason for assigning an actual situs to a judgment. For though the obligation of a judgment is a mere chose in action, the judgment itself, out of which the obligation arises, is physically enrolled upon the books of the court which rendered it, is solely within control of the court, and seems to have a fixed habitation. In two cases where the judgment creditor lived within the state where the judgment was rendered, it was held that the judgment should be taxed at the creditor's residence; the ground given is that a judgment "is merely the highest evidence of a debt," and that the debt remains the same after the judgment is rendered.[71] This older notion of a judgment has now been abandoned in favor of the more correct view that the judgment is a new right which supersedes the old.[72] In *Board of Commissioners* v. *Leonard*,[73] where an attempt was made to tax a domestic judgment in favor of a nonresident creditor, the court held that no provision had been made in the statutes for taxing such a judgment; but the court said that it "perceived no valid objection to the power of the legislature to tax all judgments by domestic courts, and remaining unsatisfied, whether owned by citizens of this state, or other states, or foreign countries." The same question came up in a later case in the same state, but went off on another point.[74]

It thus appears that there is no sufficient weight of authority to conclude the question; and the opinion expressed above may still be entertained without qualification.

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[67] Matter of Glendinning, 68 App. Div. 125, 74 N. Y. Supp. 190 (1902).

[68] Rogers *v.* Hennepin County, 240 U. S. 184 (1916).

[69] Adams Express Co. *v.* Ohio, 165 U. S. 194 (1896); People *v.* Roberts, 159 N. Y. 70, 53 N. E. 685 (1899); People *v.* Kelsey, 105 App. Div. 132, 93 N. Y. Supp. 971 (1905).

[70] Hart *v.* Smith, 159 Ind. 182, 64 N. E. 661 (1902).

[71] People *v.* Eastman, 25 Cal. 601 (1864); Meyer *v.* Pleasant, 41 La. Ann. 645, 6 So. 258 (1889).

[72] See the modern cases collected in Hilton *v.* Guyott, 42 Fed. 249 (1890).

[73] 57 Kan. 531, 46 Pac. 960 (1896).

[74] Hamilton *v.* Wilson, 61 Kan. 511, 59 Pac. 1069 (1900).

The true nature of a share of stock in a corporation is its conferring of membership in the corporation itself. The stock is a creature of the law that created the corporation, and its ownership depends solely upon the provisions of that law. The right of the owner of the stock is therefore, although intangible, a right especially created and guarded by the law of one state, is always within the power of that law, and must be regarded as within its taxing power. This, says the Supreme Court of the United States, is "the law of the property."[75] It is accordingly held that a state which charters a corporation may tax the shares of its capital stock, even though owned by a nonresident.[76]

Judge Baldwin, in *State* v. *Travelers Insurance Co.*,[77] thus expressed the reason for the rule:

"There is nothing in the objection urged in the demurrer to the complaint, that the law in question 'attempts to impose a tax upon personal property outside the jurisdiction and beyond the territory of the State.' Each non-resident shareholder participates in the enjoyment of a franchise granted by this State, and has an equitable interest in property which is protected by this State, and whose legal owner (the defendant) is one of its own citizens. The sovereign power which gave his shares a being could also give them a *situs* within its territory for purposes of taxation."

A few states do not permit this tax; but the cases must be supported on the ground that the statute of the state does not permit it, and not on any lack of power in the state to tax.[78]

In the case of a corporation which is incorporated in more than one state, with one set of shares covering the entire stock, it may be necessary to divide the entire value of each share among the states. Each state which has issued a charter has a right, to be

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[75] Tappan *v.* Merchants' Bank, 19 Wall. (U. S.) 490 (1873).

[76] *Ibid.*; State *v.* Travelers' Ins. Co., 70 Conn. 590, 40 Atl. 465 (1898); People *v.* Griffith, 245 Ill. 532, 92 N. E. 313 (1910); Faxton *v.* McCosh, 12 Ia. 527 (1861); American Coal Co. *v.* Allegany County, 59 Md. 185 (1882); Matter of Bronson, 150 N. Y. 1, 44 N. E. 707 (1896); Matter of Palmer, 183 N. Y. 238, 76 N. E. 16 (1905); People *v.* Commissioners, 5 Hun (N. Y.) 200 (1875), affirmed 64 N. Y. 541 (1876); Street R. R. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348 (1889); St. Albans *v.* National Car Co., 57 Vt. 68 (1884); Spiller *v.* Turner, [1897] 1 Ch. 911.

[77] 70 Conn. 590, 40 Atl. 465 (1898).

[78] Varner *v.* Calhoun, 48 Ala. 178 (1872); State *v.* Lesser, 237 Mo. 310, 141 S. W. 888 (1911).

sure, to tax the stock, and this right is not conditioned upon a rigidly accurate valuation;[79] nor would the fact that a certain portion of the capital stock was used outside the state affect the power of the state of charter to tax.[80] In the case of an interstate railroad, however, each charter state should tax that part of the capital stock only which is proportional to the length of line within the state.[81]

As has been seen, a debt has, properly speaking, no real situs; least of all is it situated with the debtor. To tax the debtor on the debt is taxing a vacuum. The debtor must of course pay a tax upon the borrowed money, or that which represents it in his hands; to tax him again upon the debt is either taxing the same property twice, or taxing a nonexistent thing.[82] In a few authorities this principle has been ignored,[83] notably in a decision of Mr. Justice Holmes in the Supreme Court of the United States.[84]

This was an inheritance tax upon the property of an Illinois decedent; the bulk of the property involved was a deposit in a New York bank, the small remainder a debt due the deceased from a New York debtor. The court held that the inheritance of these debts was taxable in New York "not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor"; the analogy of the garnishment case of *Chicago, Rock Island, & Pacific Ry.* v. *Sturm*[85] was cited. Mr. Justice Holmes continued:

"What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter

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[79] Welch *v.* Burrill, 223 Mass. 87, 111 N. E. 774 (1916); Moody *v.* Shaw, 173 Mass. 375, 53 N. E. 891 (1899).

[80] Matter of Palmer, 183 N. Y. 238, 76 N. E. 16 (1905).

[81] Kingsbury *v.* Chapin, 196 Mass. 533, 82 N. E. 700 (1907); Welch *v.* Burrill, 223 Mass. 87, 111 N. E. 774 (1916); Matter of Cooley, 186 N. Y. 220, 78 N. E. 939 (1906).

[82] State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300 (1872); New York L. E. & W. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894).

[83] Bank of United States *v.* State, 12 Sm. & M. (Miss.) 456 (1849); Ankeny *v.* Multnomah County, 3 Ore. 386 (1872); Maltby *v.* Reading & C. R. R., 52 Pa. 140 (1866); *Re* Joyslin, 76 Vt. 88, 56 Atl. 281 (1902). And see Commissioner of Stamps *v.* Hope, [1891] A. C. 476.

[84] Blackstone *v.* Miller, 188 U. S. 189, 205 (1903).

[85] 174 U. S. 710 (1898).

that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander, that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

"Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way.

"There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign-Held Bonds*, 15 Wall. 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker*, 177 Mass. 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases. *Savings & Loan Society* v. *Multnomah County*, 169 U. S. 421, 428; *New Orleans* v. *Stempel*, 175 U. S. 309, 319, 320."

It is submitted that the ideas here expressed are quite untenable; though one hesitates to differ in opinion from so acute, profound, and learned a judge. The opinion appealed from, *Matter of Blackstone*,[86] allowed the tax upon the authority of *Matter of Houdayer*,[87] the case by which was established the New York doctrine that a bank deposit is taxable as property located at the bank; and the small debt which was not a bank deposit was not considered at all. Mr. Justice Holmes himself expressed the same

[86] 171 N. Y. 682, 64 N. E. 1118 (1902).
[87] 150 N. Y. 37, 44 N. E. 718 (1896).

view in another part of this opinion. The decision in *State Tax on Foreign-Held Bonds* had not been modified by the cases cited upon the point in question, since *Savings & Loan Society* v. *Multnomah County* merely disapproved a dictum in the case with regard to the taxation of mortgaged land, while *New Orleans* v. *Stempel* rested upon the doctrine of a business situs. The argument in support of the view taken proves too much. It is true that the state of the debtor's domicile enforces the debt; so does the law of every other state into which the debtor comes or has property. If one state may therefore tax the debt, so should the other; indeed each state which allows a suit on the debt taxes that privilege, by the fees of court. This fact is recognized in a later garnishment case, *Harris* v. *Balk*,[88] which allows an action of garnishment in any state in which the garnishee can be found, thus depriving the cited case of *Chicago, Rock Island, & Pacific Ry.* v. *Sturm* of its efficacy in the instant decision. It is also true that the state which created the contract created also its power of surviving; that was done at the time the contract was created, and might then have been paid for by an excise tax had the Constitution of the United States not forbidden; but there is no necessary connection between the domicile of the debtor and the place where the debt was created. It is also true that the state of the debtor's domicile permits the debt to be collected by an administrator of its appointment; so does every state in which an administrator is appointed.

Such decisions are, however, only sporadic. By the great weight of authority it is agreed that a debt has no territorial situs, and can be taxed only as part of the personal tax of the creditor. A creditor may be taxed in the state of his domicile upon all debts and choses in action due to him; [89] but the state of the debtor cannot tax a debt due to a nonresident creditor.[90]

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[88] 198 U. S. 215 (1905).

[89] Scripps *v.* Board of Review, 183 Ill. 278, 55 N. E. 700 (1899); Wilcox *v.* Ellis, 14 Kan. 588 (1875); Fisher *v.* Rush County, 19 Kan. 414 (1877); Thomas *v.* Mason County Court, 4 Bush (Ky.) 135 (1868); State *v.* Bentley, 23 N. J. L. 532 (3 Zab.) (1852); State *v.* Darcy, 51 N. J. L. 140, 16 Atl. 160 (1888); Conner *v.* Wilson, 6 Ohio Dec. (Repr.) 941, 9 Am. L. Rec. 1 (1880); McKeen *v.* County of Northampton, 49 Pa. 519 (1865); Commonwealth *v.* Pennsylvania Coal Co., 197 Pa. 551, 47 Atl. 740 (1901); Grundy County *v.* Tennessee Coal I. & R. Co., 94 Tenn. 295, 29 S. W. 116 (1895).

[90] San Francisco *v.* Mackay, 10 Sawy. 431, 22 Fed. 602 (1884); Jack *v.* Walker,

Nowhere is the reason for this doctrine better and more forcibly expressed than by Judge Robertson in *Thomas* v. *Mason County Court.*[91] In that case a debt was due from an Ohio debtor to a minor ward in Kentucky, and a tax had been laid by Kentucky on the amount of the debt. It was objected that the debtor had already paid taxes in Ohio upon the property represented by the debt; but the Kentucky tax was upheld by the court, which said:

"Borrowed capital in Ohio is taxable as the borrower's property there, and the debt due to the lender in Kentucky is taxable here as her property. In this case, the ward's right to the money in Ohio is a portion of the wealth of Kentucky and ought to contribute to the burthens of the government which protects her; and if it could escape contribution by lending it in Ohio, a knowledge of that fact would encourage the exhausting deportation of the money of Kentucky to augment the wealth of some other State."

The older cases, as well as some recent cases, regard notes, bonds, certificates of stock, and other commercial securities as mere evidences of debt or obligation, and as taxable therefore to the owner at his domicile as part of his personal estate. Thus a bond is taxable at the domicile of the owner,[92] though it may be actually situated outside the state; [93] and a note may be taxed at the residence of the holder,[94] though it is kept elsewhere.[95] On the same principle, stock in a foreign corporation is taxable at the

79 Fed. 138 (1897); Collins *v.* Miller, 43 Ga. 336 (1871); Williams *v.* Mandell, 44 Ga. 26 (1871); Foresman *v.* Byrns, 68 Ind. 247 (1879); McCartney *v.* Caskey, 66 Kan. 412, 71 Pac. 832 (1903); Barber Asphalt Paving Co. *v.* New Orleans, 41 La. Ann. 1015, 6 So. 794 (1889); Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 44 La. Ann. 760, 11 So. 91 (1892); Railey *v.* Board of Assessors, 44 La. Ann. 765, 11 So. 93 (1892); Howell *v.* Gordon, 127 Mich. 517, 86 N. W. 1042 (1901); St. Paul *v.* Merritt, 7 Minn. 258 (1862); Matter of Bentley, 31 N. Y. Misc. 656, 66 N. Y. Supp. 95 (1900); Matter of Abbett, 29 N. Y. Misc. 567, 61 N. Y. Supp. 1067 (1899); Myers *v.* Seaberger, 45 Ohio St. 232, 12 N. E. 796 (1887).

[91] 4 Bush (Ky.) 135 (1868).

[92] State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300, 324 (1872); Kirtland *v.* Hotchkiss, 100 U. S. 491 (1879); Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696 (1896); Augusta *v.* Dunbar, 50 Ga. 387 (1873); Street R. R. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348 (1889) (*semble*).

[93] Crosby *v.* Charlestown (N. H.), 95 Atl. 1043 (1915); Commonwealth *v.* Williams, 102 Va. 778, 47 S. E. 867 (1904). Even though pledged there: Commonwealth *v.* Buffalo & L. E. T. Co., 233 Pa. 79, 81 Atl. 932 (1911).

[94] Collins *v.* Miller, 43 Ga. 336 (1871).

[95] Hunter *v.* Board of Supervisors, 33 Ia. 376 (1871); Crosby *v.* Charlestown (N. H.), 95 Atl. 1043 (1915).

residence of the owner,[96] though the certificate of stock is kept outside the state,[97] and even though it may be held by a trustee in another state in pledge;[98] but stock in a foreign corporation owned by a nonresident is not taxable.[99]

A bank deposit is, strictly speaking, a mere debt, due from the bank to the depositor; as a mere chose in action it is without actual situs, and in accordance with general principles it should be included in the tax paid by the depositor at his domicile. This has often been held;[100] and the state where the bank is situated has for the same reason refused to tax the deposit.[101]

The opposite doctrine was, however, laid down in New York. In *Matter of Houdayer*[102] a bank account of a nonresident was taxed; either because it was property there situated, or because it was an intangible especially protected there. Judge Vann in the course of his argument said:

"While the relation of debtor and creditor technically existed, practically he had his money in the bank, and could come and get it when he wanted it. It was an investment in this state, subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this state. The depositary was a resident corporation, and the receiving and retaining of the money were corporate acts in this state. Its repayment would be a corporate act in this state. Every right springing from the deposit was created by the laws

[96] Wright *v.* Louisville & N. R. R., 195 U. S. 219 (1904); San Francisco *v.* Flood, 64 Cal. 504, 2 Pac. 264 (1884); Lockwood *v.* Weston, 61 Conn. 211, 23 Atl. 9 (1891); Greenleaf *v.* Board of Review, 184 Ill. 226, 56 N. E. 295 (1900); Seward *v.* Rising Sun, 79 Ind. 351 (1881); Morril *v.* Bentley, 150 Ia. 677, 130 N. W. 734 (1911); Bellows Falls Power Co. *v.* Commonwealth, 222 Mass. 51, 109 N. E. 891 (1915); Bacon *v.* State Tax Commissioners, 126 Mich. 22, 85 N. W. 307 (1901); Worthington *v.* Sebastian, 25 Ohio St. (1874); Bradley *v.* Bauder, 36 Ohio St. 28 (1880); Dupuy *v.* Johns (Pa.), 104 Atl. 565 (1918). *Contra*, People *v.* Commissioners, 5 Hun (N. Y.) 200 (1875); affirmed 64 N. Y. 541 (1876).

[97] Stanford *v.* San Francisco, 131 Cal. 34, 63 Pac. 134 (1900); Crosby *v.* Charlestown (N. H.), 95 Atl. 1043 (1915); Commonwealth *v.* Williams, 102 Va. 778, 47 S. E. 867 (1904).

[98] Central of Georgia Ry. *v.* Wright, 166 Fed. 153 (1908); appeal dismissed, 215 U. S. 617 (1909).

[99] Matter of James, 144 N. Y. 6, 38 N. E. 961 (1894); Matter of Bishop, 82 App. Div. 112, 81 N. Y. Supp. 474 (1903).

[100] Hunt *v.* Turner, 54 Fla. 654, 45 So. 509 (1907); Horne *v.* Greene, 52 Miss. 452 (1876).

[101] Pyle *v.* Brenneman, 122 Fed. 787 (1903); State *v.* Clement Nat. Bank, 84 Vt. 167, 78 Atl. 944 (1911); Pendleton *v.* Commonwealth, 110 Va. 229, 65 S. E. 536 (1909).

[102] 150 N. Y. 37, 40, 44 N. E. 718 (1896).

of this state. Every act out of which those rights arose was done in this state. In order to enforce those rights, it was necessary for him to come into this state. Conceding that the deposit was a debt, conceding that it was intangible, still it was property in this state, for all practical purposes, and in every reasonable sense within the meaning of the Transfer Tax Act."

This case was followed in New York[103] and in other jurisdictions.[104]

In the New Hampshire case of *Berry* v. *Windham*[105] a different reason was given for holding the deposit taxable where the bank was situated, and refusing to permit a tax at the domicile of the depositor. A resident of New Hampshire deposited money in a savings bank in Lawrence, Massachusetts, and it was held that no tax could be levied in New Hampshire. Judge Stanley said:

"When the plaintiff deposited his money in the Lawrence savings-bank, the division of the title thereby into legal and equitable ownership did not multiply its capacity for taxation. The division of the title did not increase the amount of taxable property, nor did it subject the property, the title to which was thus divided, to the liability to be twice taxed."

These somewhat questionable methods of justifying taxation at the bank need, however, not be supported; for the Supreme Court of the United States has placed the doctrine on a much more satisfactory ground;[106] although the argument used by the New York courts was given some weight also. "There is no doubt," said Mr. Justice Holmes, "that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference." This is characteristic of the modern attitude toward the legal problems of taxation; which are treated in a practical rather than a technical way by the courts.

A bank account which is only temporarily within the state cannot be taxed; as, for instance, where it is deposited merely for the

[103] Matter of Clark, 9 N. Y. Supp. 444, 2 Connoly Surr. 183 (1890); Matter of Burr, 16 N. Y. Misc. 89, 38 N. Y. Supp. 811 (1895).

[104] New York Life Ins. Co. *v.* Orleans Board of Assessors, 158 Fed. 462 (1908); Schmidt *v.* Failey, 148 Ind. 150, 47 N. E. 326 (1897); Marshall Wells Hardware Co. *v.* Multnomah County, 58 Ore. 469, 115 Pac. 150 (1911).

[105] 59 N. H. 288, 290 (1879).

[106] Blackstone *v.* Miller, 188 U. S. 189 (1903).

purpose of being transmitted by check to the owner. So in *Matter of Leopold*,[107] money of a non-resident was on deposit in a New York bank for the purpose of making a particular immediate investment; the depositor died before the investment could be made. The deposit was held not to have a permanent situs in New York for the purpose of an inheritance tax. In the case of *Blackstone* v. *Miller*,[108] however, where a sum of money was deposited in a New York bank by a resident of Illinois, and had so remained for more than a year, presumably awaiting investment, but with no particular investment in mind, the deposit was held to have a taxable situs in the state, and not to be merely *in transitu*.

V. Taxation of Business Capital and Income

A piece of property may consist of an aggregate mass made up of units which from to time vary. A typical example of such an aggregate is the stock in trade of a business which is constantly being diminished by sales and increased by purchases, yet at all times constituting a single stock and, roughly speaking, having a tolerably constant value. In spite of the fact that the units are constantly changing and that it may not be possible to fix a situs for any one unit in the mass, it is quite possible that the entire mass regarded as an entity should be assigned to a situs. Upon this ground it has been held that a merchant's stock in trade is taxable at its assessed value in the place where the business is being carried on, though the owner may be a nonresident,[109] because it is "permanently located" there. In the language of Boyd, J., "the articles are changing from day to day, but the stock, which represents the aggregate of the goods and chattels remains about the same."[110] For the same reason accounts receivable for business carried on are taxable at the place of the business.[111] Thus where a fraternal organization carried on its business in Fulton, but its

[107] 35 N. Y. Misc. 369, 71 N. Y. Supp. 1032 (1901).

[108] 188 U. S. 189 (1903).

[109] People *v.* Roberts, 171 U. S. 658 (1898); Shaw *v.* Hartford, 56 Conn. 351, 15 Atl. 742 (1888); Leonard *v.* New Bedford, 16 Gray (Mass.) 292 (1860); Hilliard *v.* Fells Ice Co., 200 Mass. 331, 86 N. E. 773 (1909); People *v.* Barker, 141 N. Y. 118, 36 N. E. 1073 (1894); People *v.* Roberts, 151 N. Y. 652, 46 N. E. 1150 (1897).

[110] Hopkins *v.* Baker, 78 Md. 363, 28 Atl. 284 (1894).

[111] People *v.* Barker, 157 N. Y. 159, 51 N. E. 1043 (1898).

funds were held by its treasurer in Ottawa, it was held that it was taxable on its "funds and credits" in Fulton.[112]

So it is with profits or proceeds of the business in the form of accounts due to the business; they are taxable where the business is carried on. Thus where a foreign corporation carried on a warehouse in Kentucky, storage charges due to the corporation are taxable in Kentucky.[113]

The commonest application of this principle is the case where a fund is invested in a foreign state, through an agent, in local loans, new investments being constantly made as income is received from the fund or as old investments are paid. The leading case on this point is the case of *Catlin* v. *Hull*.[114] In that case one Hammond, a resident of New York, who owned a large number of promissory notes against residents of the town of Orwell, in Vermont, placed these notes in the hands of a resident of Orwell as his agent. The agent was to manage the business of collecting and reloaning interest and principal in the interest of the owner. A tax was imposed upon the notes. It was argued that the tax was invalid on the ground that the debts being personal property had no situs, apart from the domicile of the owner. The court, however, held that where the property in fact was, the law had power to tax it. The court did not discuss at length the question of whether the notes really had a situs in the state, assuming that question. The case was at once generally followed.[115]

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[112] People *v.* Mystic Workers of the World, 270 Ill. 496, 110 N. E. 907 (1915).

[113] Commonwealth *v.* Kentucky D. & W. Co., 143 Ky. 314, 136 S. W. 1032 (1911).

[114] 21 Vt. 152 (1849).

[115] Bristol *v.* Washington County, 177 U. S. 133 (1899); M'Cutcheon *v.* Rice County, 7 Fed. 558 (1881); Walker *v.* Jack, 88 Fed. 576 (1898); Battle *v.* Mobile, 9 Ala. 234, (1846); People *v.* Home Ins. Co., 29 Cal. 533 (1866); Board of Supervisors *v.* Davenport, 40 Ill. 197 (1866); Goldgart *v.* People, 106 Ill. 25 (1883); People *v.* Davis, 112 Ill. 272 (1884); Hayward *v.* Board of Review, 189 Ill. 234, 59 N. E. 601 (1901); New Albany *v.* Meekin, 3 Ind. 481 (1852); Foresman *v.* Byrns, 68 Ind. 247 (1879) (*semble*); Hathaway *v.* Edwards, 42 Ind. App. 22, 85 N. E. 28 (1908); Hunter *v.* Board of Supervisors, 33 Ia. 376 (1871) (*semble*); Hutchinson *v.* Board of Supervisors, 66 Ia. 35, 23 N. W. 249 (1885); Buck *v.* Miami County (Kan.), 173 Pac. 344 (1918); Wilcox *v.* Ellis, 14 Kan. 588 (1875); Fisher *v.* Rush County, 19 Kan. 414 (1877); *In re* Jefferson, 35 Minn. 215, 28 N. W. 256 (1886); State *v.* London & N. W. A. Mtg. Co., 80 Minn. 277, 83 N. W. 339 (1900); State *v.* St. Louis County Court, 47 Mo. 594 (1871) (*semble*); Finch *v.* York County, 19 Neb. 50, 26 N. W. 589 (1886); Bowman *v.* Boyd, 21 Nev. 281, 30 Pac. 823 (1892); People *v.* Gardner, 51 Barb. (N. Y.) 352 (1868); Williams *v.* Wayne County, 78 N. Y. 561 (1879); Boardman *v.* Tompkins County, 85 N. Y. 359 (1881); Redmond *v.* Commissioners, 87 N. C. 122 (1882); Poppleton *v.* Yamhill County,

The decisions with regard to the taxation of notes and other securities in the hands of a local agent were sometimes based upon the theory that the securities had an actual physical situs within the state.[116] But these cases are exceptional; the power cannot be rested solely upon this ground, since it is almost universally applied as well to debts and other intangible property as to notes and bonds. Credits acquired in the course of business are taxable as business capital, situated at the place of business.[117] The received doctrine is well stated by Chief Justice Whitfield in *Adams* v. *Colonial & United States Mortgage Co.*[118]

"Wherever the money of a lender in one state is by the principal intrusted to the control of an agent in another state for the purpose of being kept in the latter state, and loaned out, collected, and reloaned, or habitually kept on deposit, for safety merely, . . . so as thus to remain, through a course of dealing, so long as to become localized as a part of the whole mass of personal property in the latter state, such money acquires what is known as a 'business situs' for the purpose of taxation."

The assets constitute, as it were, the subject matter or stock in trade of such business.[119] Thus, in *Metropolitan Life Insurance Co.* v. *New Orleans* [120] Mr. Justice Moody said:

"We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the State. The State undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the State had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital

18 Ore. 377, 23 Pac. 253 (1890); Billinghurst *v.* Spink County, 5 S. D. 84, 58 N. W. 272 (1894).

[116] New Orleans *v.* Stempel, 175 U. S. 309 (1889).

[117] See most of the cases cited above, note 115, as well as the following: People *v.* Willis, 133 N. Y. 383, 31 N. E. 225 (1892); People *v.* Barker, 157 N. Y. 159, 51 N. E. 1043 (1898); Matter of McMahon, 66 How. Pr. (N. Y.) 190 (1883); Marshall-Wells Hardware Co. *v.* Multnomah County, 58 Ore. 469, 115 Pac. 150 (1911).

[118] 82 Miss. 263, 392, 34 So. 482 (1903).

[119] Boggs, J., in Matzenbaugh *v.* People, 194 Ill. 108, 116, 62 N. E. 546 (1902).

[120] 205 U. S. 395, 402 (1907).

by removing temporarily from the State evidence of credits in the form of notes. Under such circumstances, they have a taxable situs in the State of their origin."

It will be noticed that in the case just quoted the notes were from time to time sent by the agent to the owner to be held by him. The court regarded this as a mere temporary absence from the place where they were really and constantly in use, that is, the place where the business was carried on. This fact, of course, accentuates the position taken by the court that the notes were taxable as part of a stock in trade.

The general doctrine is illustrated by a series of decisions in Louisiana, in which legislation has been especially directed to the taxation of business done within the state by nonresidents. In the first case a bank deposit made by a local agent of a non-resident was held not taxable. *Clason* v. *Board of Assessors*.[121] In *Bluefields Banana Co.* v. *Board of Assessors*,[122] this was distinguished as a temporary deposit, and a bank deposit permanently used in carrying on the business was held taxable. The case was followed in *Parker* v. *Strauss*.[123] These decisions were, however, soon discredited. In *Liverpool & London & Globe Insurance Co.* v. *Board of Assessors*,[124] it was held that bills receivable due to a foreign corporation arising out of business done within the state were not taxable; on the ground that debts in non-concrete form, *i. e.*, simple contract debts, have no situs, and can be taxed at the domicile of the creditor. A year later the court in the case of *Comptoir National* v. *Board of Assessors* [125] allowed a local tax upon notes received in the course of business by a foreign corporation, though the notes were not negotiable; and the same decision was reached as to due-bills received in the course of business in *Monongahela R. C. C. & C. Co.* v. *Board of Assessors*.[126]

Up to this time the power to tax in this sort of case seems to have been conditioned upon the presence of a concrete debt or specialty within the state. But in two well-reasoned cases, simultaneously decided, the court overruled the earlier case and held

[121] 46 La. Ann. 1, 14 So. 306 (1894).
[122] 49 La. Ann. 43, 21 So. 627 (1897).
[123] 49 La. Ann. 1173, 22 So. 329 (1897).
[124] 51 La. Ann. 1028, 25 So. 970 (1899).
[125] 52 La. Ann. 1319, 27 So. 801 (1900).
[126] 115 La. Ann. 564, 39 So. 601 (1905).

that the state might tax simple contract debts due to a nonresident, arising out of business done within the state. *National Fire Insurance Co.* v. *Board of Assessors*,[127] *General Electric Co.* v. *Board of Assessors*,[128] soon followed in *Travelers' Insurance Co.* v. *Board of Assessors*.[129] The general line of reasoning adopted in these cases is that the permanent employment of capital in the carrying on of business within the state gave to all portions of the capital an actual situs within the state, even though it might for the time being take an intangible form.

Several of the decisions of the Supreme Court of Louisiana were carried to the Supreme Court of the United States, and were there affirmed upon the reasoning indicated.[130]

While the weight of authority in favor of this doctrine is overwhelming, a few exceptional cases must be noted. Thus a statute of 1851 in New York expressly exempted from taxation foreign capital transmitted to agents for investment.[131] It was thereupon attempted to tax at the domicile of the owner in New York similar investments in the hands of an agent in another state. The court held, however, that such property had no situs in New York, and was therefore not taxable there under the New York law which, as has been seen, taxes tangible property only at its situs.[132] And in *State* v. *Gaylord*,[133] the court held that foreign investments of this sort could be taxed at the domicile of the owner. Of the numerous cases cited to sustain the contention that the investments were taxable in the state where the agent made them, Cassoday, J., said, "We decline to follow them."

The ordinary cases in this class must be carefully distinguished from a mere deposit of securities with an agent to hold, or even to collect. Neither the deposit of securities for safe keeping in the place nor sending them into that place for collection is enough to fix the situs of the securities there.[134] In a rather striking case

[127] 121 La. 108, 46 So. 117 (1908). [128] 121 La. 116, 46 So. 122 (1908).

[129] 122 La. 129, 47 So. 439 (1908).

[130] New Orleans *v.* Stempel, 175 U. S. 309 (1899); Board of Assessors *v.* Comptoir National, 191 U. S. 388 (1903); Metropolitan Life Insurance Co. *v.* New Orleans, 205 U. S. 395 (1907); Liverpool & London & Globe Insurance Co. *v.* Orleans Assessors, 221 U. S. 346 (1911).

[131] People *v.* Commissioners, 59 N. Y. 40 (1874).

[132] People *v.* Smith, 88 N. Y. 576 (1882).

[133] 73 Wis. 316, 41 N. W. 521 (1889).

[134] Reat *v.* People, 201 Ill. 469, 66 N. E. 242 (1903); Appeal of Borden, 208 Ill. 369,

securities were deposited in a state as a guarantee for the performance of a contract there; it was held, nevertheless, that the securities had no such permanent location there that they could be said to have a situs.[135] So a bank deposit by a local agency, not to be drawn on for the expenses of the agency, but to be transmitted by check to the home office, has no permanent local situs.[136]

It would seem to make no difference whether the business is done through an agent or by the nonresident owner in person. It has, however, been intimated in one case that if the owner himself carries on business the capital cannot be taxed at its business situs.[137] And it is clear that if the lender himself receives applications and loans money outside the state, though all the borrowers are within the state, the capital cannot be taxed.[138]

The actual capital of a going concern may be much greater than the sum of its tangible assets. The gathering together of property into "organic unity," by which each piece of tangible property "is part of a system, and has its actual uses only in connection with other parts of the system," creates a new element of value, as a result of the added usefulness of each part. "The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole." [139] Not only this new element of value exists in such a case; the employment of the entire property in business results, or may result, in another access of value, due to the goodwill of the business thus carried on. The business capital, therefore, includes these items of incorporeal but none the less actual wealth. In the case of business

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70 N. E. 310 (1904); Channel *v.* Capen, 46 Ill. App. 234 (1891); Commonwealth *v.* Northwestern M. L. Ins. Co., 32 Ky. L. Rep. 796, 107 S. W. 233 (1908). *Contra*, Hall *v.* Miller, 102 Tex. 289, 115 S. W. 1168 (1909).

[135] Louisville & N. R. R. *v.* Wright, 236 Fed. 148 (1916).

[136] Board of Assessors *v.* New York L. I. Co., 216 U. S. 517 (1910); Howell *v.* Gordon, 127 Mich. 517, 86 N. W. 1042 (1901); Metropolitan Life Ins. Co. *v.* Newark, 62 N. J. L. 74, 40 Atl. 573 (1898); Myers *v.* Seaberger, 45 Ohio St. 232, 12 N. E. 796 (1887).

[137] Theobald *v.* Clapp, 43 Ind. App. 191, 87 N. E. 100 (1909).

[138] Provident S. L. A. Soc. *v.* Kentucky, 239 U. S. 103 (1915); State *v.* Packard (N. D.), 168 N. W. 673 (1918).

[139] The quotations are from the opinion of Mr. Justice Holmes in Fargo *v.* Hart, 193 U. S. 490, 499 (1904).

carried on by a corporation, as such business is usually carried on, this added intangible wealth goes by the name of the corporate excess.

Various ways have been tried to establish the amount of this excess; but they may all be reduced to one of two plans. One is the "capitalization-of-income plan," by which the net income of the business is capitalized at a reasonable rate, and the result taken as the value of the capital; and this is a recognized and permitted method.[140] The other is the stock-and-bond plan, by which the value of the stock is added to the amount of bonds outstanding, and the result is taken as the value of the capital.[141] If the latter method is adopted, its correctness must rest upon the theory that the stock represents the interest of the mortgagor corporation above the amount of the mortgage incumbrance represented by the bonds. The importance of the bonds is, therefore, that they represent the mortgage debt, and the par value of the bonds is the amount that should be added to the market value of the stock in order to get at the true value of the capital. If this course is taken, the result is a fair measure of the market value of the capital, which is in all ordinary cases the true value; a decision, therefore, which holds this method unfair appears to be unsound.[142] On the other hand, it would be unfair to add the market price of the bonds to that of the stock, as is sometimes done;[143] for the market value of the stock represents the value of the property over the funded debt, which is not the same thing as the market value of the bonds.

No one way can be regarded as essential. All elements of value may properly be considered by the assessing body.[144]

It may happen in the case of an interstate corporation that the tangible stock in trade, although in reality a single aggregate mass, is located in several states. The leading case on this point is *Pullman's Palace Car Co.* v. *Pennsylvania*.[145] In that case it appeared that the stock in trade of the corporation consisted chiefly in a considerable number of cars in constant use upon railroad

[140] Louisville & Nashville R. R. *v.* Greene, 244 U. S. 522 (1917).
[141] State Railroad Tax Cases, 92 U. S. 575 (1875).
[142] Railroad & Telephone Companies *v.* Board of Equalizers, 85 Fed. 302 (1897).
[143] *E. g.*, in State Railroad Tax Cases, 92 U. S. 575 (1875).
[144] Great Northern Ry. *v.* Okanogan County, 223 Fed. 198 (1915).
[145] 141 U. S. 18 (1888).

lines throughout the United States. An attempt was made by the state of Pennsylvania to tax a portion of this mass on the ground that this portion had a situs in Pennsylvania. The particular method taken of estimating Pennsylvania's share of the entire mass was to take that proportion of all the mass of cars which the miles of road on which the cars traveled within the state bore to the total mileage in the United States. The Supreme Court of the United States held that it was legally possible to divide the entire mass among the states and that the method of division adopted by the state of Pennsylvania was a reasonable one.

It will be seen, therefore, that wherever a mass of property is invested in interstate business it is not only possible to assign a situs at large to the entire mass wherever the business is carried on, but also to estimate the situs of any particular part of the mass by some reasonable method of aliquot division.

This method of determining the share of an interstate mass which may be regarded as situated in a particular state has been applied to lines of railroad,[146] to a fleet of steamships,[147] to a mass of railroad cars such as palace cars or refrigerator cars,[148] to the stock of express companies,[149] and to the property of telegraph and telephone companies.[150]

Not only is the tangible property of an interstate business to be thus divided; the intangible "corporate excess" is capable of the same reasonable division among the states within which business is done.[151]

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[146] Pittsburgh C. C. & S. L. Ry. *v.* Backus, 154 U. S. 421 (1894); Louisville & Nashville R. R. *v.* Greene, 244 U. S. 522 (1917); Atchison, T. & S. F. Ry. *v.* Sullivan, 173 Fed. 456 (1909).

[147] County Commissioners *v.* Old Dominion S. S. Co., 128 N. C. 558, 39 S. E. 558 (1901), affirmed.

[148] Pullman's P. C. Co. *v.* Pennsylvania, 141 U. S. 18 (1888); American R. T. Co. *v.* Hall, 174 U. S. 70 (1899); Pullman's P. C. Co. *v.* Twombly, 29 Fed. 658 (1887); Board of Assessors *v.* Pullman's P. C. Co., 60 Fed. 37 (1894); Morrell R. C. Co. *v.* Commonwealth (Ky.), 32 Ky. L. Rep. 1383, 108 S. W. 926 (1908).

[149] Adams Express Co. *v.* Ohio, 165 U. S. 194 (1896); Adams Express Co. *v.* Kentucky 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897); Fargo *v.* Hart, 193 U. S. 490 (1904); Wells Fargo & Co.'s Express *v.* Crawford County, 63 Ark. 576, 40 S. W. 710 (1897); Southern Express Co. *v.* Patterson, 122 Tenn. 279, 123 S. W. 353 (1909).

[150] Massachusetts *v.* Western U. T. Co., 141 U. S. 40 (1890); Western U. T. Co. *v.* Taggart, 163 U. S. 1 (1896) (affirming S. C. 141 Ind. 281, 40 N. E. 105) (1894); Western U. T. Co. *v.* Poe, 64 Fed. 9 (1894); State *v.* Western U. T. Co., 165 Mo. 502, 65 S. W. 775 (1901).

[151] Adams Express Co. *v.* Ohio, 165 U. S. 194 (1897); Pullman Co. *v.* Trapp, 186

This doctrine is clearly set forth by Mr. Justice Brewer in *Adams Express Co.* v. *Ohio State Auditor*:[152]

"The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, etc.; that this tangible property is their only property within the State; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.

"But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property. . . . It matters not in what this intangible property consists — whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which though intangible exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property? . . .

"According to its figures this intangible property, its franchises, privileges, etc., is of the value of $12,000,000, and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. . . . That this is true is obvious from the result that would follow if all the States other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those States, but unable to transact the express business within their limits, that $12,000,000

Fed. 126 (1911); Wells Fargo & Co.'s Express *v.* Crawford County, 63 Ark. 576, 40 S. W. 710 (1897).

[152] 166 U. S. 185, 218–19, 223 (1897).

of value attributable to its intangible property would shrivel to a mere trifle."

It is obvious, as Mr. Justice Holmes remarks,[153] that "this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning." Before distributing the "corporate excess" among the states it is first necessary to arrive at its value by first deducting from the entire value of the capital stock the value of all real estate, whether situated within the state or outside,[154] and of all machinery and other tangible personal property.[155] Intangible investments of the company not in any way used in the business, such as undivided profits represented by investment securities, must also be deducted, since they do not affect the value for use of the business.[156] The result of this subtraction is the corporate excess, which may be divided among the states ratably by the method already considered.

It has been held that a state may vary this method by dividing the entire capital, ratably, and then making a proper allowance for property in other states that would disturb the ratio.[157] But though permissible this method is most inexact, and seems open to the objection to such loose calculations quoted above from Mr. Justice Holmes.

The whole doctrine has elsewhere been summarized by the author.[158] Whenever a business enterprise exists, in which property situated in several states is used, and the business is carried on in several states, the whole value of the business includes or may include more than the aggregate of the several articles of property used in it; and this excess may properly be referred not to any one state, but to all the states in which the business is done. But that part of the value which may be divided among the states

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[153] Fargo *v.* Hart, 193 U. S. 490 (1904).

[154] Pittsburgh, C. C. & St. L. R. R. *v.* Backus, 154 U. S. 421, 431 (1894); Western U. T. Co. *v.* Taggart, 163 U. S. 1 (1896).

[155] Western U. T. Co. *v.* Taggart, 163 U. S. 1 (1896); Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194 (1897), 166 U. S. 185, 222, 223, 17 Sup. Ct. Rep. 604.

[156] Fargo *v.* Hart, 193 U. S. 490 (1904); Coulter *v.* Weir, 127 Fed. 897 (1904).

[157] Louisville & Nashville R. R. *v.* Greene, 244 U. S. 522 (1917).

[158] BEALE, FOREIGN CORPORATIONS, § 507.

is that only which is equally applicable to all. Fixed tangible property, being referable only to the state in which it is situated, should be deducted from the whole value of the business before dividing the excess; though tangible property which is used throughout the business may be divided with the excess. In the same way if good-will is greater in one state than in another, it should be subtracted and separately taxed. The balance, the corporate excess, may properly be divided among the states in proportion to the amount of business done or capital invested in each.

VI. Taxation of Property held by Fiduciary

Where the legal title, or any other legal interest in property, is in the hands of a fiduciary, two special problems arise: first, may the property be taxed as if it were the ordinary property of the fiduciary; second, may a tax be levied upon the beneficiary. The different classes of fiduciaries require somewhat different treatment, and will be considered separately.

In the case of real estate, as has been seen, each interest may be taxed separately or all together in the name of the paramount owner. This is true as well of legal and beneficiary interests as of distinct legal interests; the place of taxation always being the situs of the land. Thus, the situs of land held by a trustee to secure an issue of bonds might tax the land in the name of the trustee.[159] The beneficiary, on the other hand, might be taxed on his equitable interest; thus a nonresident member of a real estate trust which held land in Massachusetts might be taxed in Massachusetts upon his equitable interest in the land.[160]

The trustee of personal property being the complete legal owner of it, it would naturally be expected that the property should be taxed exactly as if it were his own. It has accordingly been held that a trustee of personal property is taxable on it at his domicile,[161] although the property may be situated outside the state,[162] or although the beneficiaries be nonresident.[163] Thus stock in a

[159] Frankfort *v.* Fidelity T. & S. V. Co., 111 Ky. 667, 64 S. W. 470 (1901) (*semble*). Kentucky had no statute allowing the taxation of a mortgage interest.

[160] Kinney *v.* Treasurer, 207 Mass. 368, 93 N. E. 586 (1911).

[161] Higgins *v.* Commonwealth, 126 Ky. 211, 103 S. W. 306 (1907); Walla Walla *v.* Moore, 16 Wash. 339, 47 Pac. 753 (1897).

[162] Guthrie *v.* Pittsburgh C. & S. L. Ry., 158 Pa. 433, 27 Atl. 1052 (1893).

[163] Price *v.* Hunter, 34 Fed. 355 (1888); Davis *v.* Macy, 124 Mass. 193 (1878);

New York corporation, standing in the name of a New York broker who holds the certificate for a nonresident owner, is taxable in New York.[164] In New York and a few other states, however, where both the property and the beneficiaries are outside the state, a resident trustee will not be taxed; though the power of the legislature by a change in the law to tax him is not doubted.[165]

The power of the state of his residence to tax the beneficiary of a trust cannot be doubted,[166] though in some states it has been held that without the aid of a statute it will not be done.[167] In Kentucky it has been held that property held in trust cannot be taxed where the trustee resides, but only at the domicile of the beneficial owner.[168]

There seems to be no ground for distinguishing a testamentary trust from any other; and it has been held in a well-reasoned decision in Maine that nonresident trustees for nonresident beneficiaries, appointed in a will of a resident decedent, after they had removed the property outside the state, were not taxable, notwithstanding the origin of the trust.[169] In a Pennsylvania case,[170] however, a trustee under the will of a deceased resident of New York changed his domicile to Pennsylvania, taking the trust property with him. He changed an investment after his removal. The court held that he was taxable upon the investment made in Pennsylvania, but not upon the trust property which had come into his hands in New York; the remarkable ground for the distinction being, that as to the latter property he was not a trustee under the Pennsylvania law. He assuredly was owner of the property, though he held it, to be sure, in trust; and it would seem that the origin of his title was immaterial.

Detroit *v.* Lewis, 109 Mich. 155, 66 N. W. 958 (1896); Carlisle *v.* Marshall, 36 Pa. 397 (1860).

[164] Matter of Newcomb, 71 App. Div. 606, 76 N. Y. Supp. 222 (1902) (affirmed 172 N. Y. 608, 64 N. E. 1123) (1902).

[165] People *v.* Tax Commissioners, 21 Abb. N. C. (N. Y.) 168 (1888); Goodsite *v.* Lane, 139 Fed. 593 (1905).

[166] Keeney *v.* New York, 222 U. S. 525 (1912); Augusta *v.* Kimball, 91 Me. 605, 40 Atl. 666 (1898) (*semble*); Hunt *v.* Perry, 165 Mass. 287, 43 N. E. 103 (1896); Selden *v.* Brooke, 104 Va. 832, 52 S. E. 632 (1906); Wise *v.* Commonwealth (Va.), 95 S. E. 632 (1918); Brooklyn Trust Co. *v.* Booker (Va.), 95 S. E. 664 (1918).

[167] Anthony *v.* Caswell, 15 R. I. 159, 1 Atl. 290 (1885).

[168] Boske *v.* Security T. & S. V. Co. 22 Ky. L. Rep. 181, 56 S. W. 524 (1900).

[169] Augusta *v.* Kimball, 91 Me. 605, 40 Atl. 666 (1898).

[170] Lewis *v.* Chester County, 60 Pa. 325 (1869).

Ownership of tangible property by a trustee does not, of course, prevent its taxation at its situs.[171]

The case of the executor or administrator is more complicated than that of the trustee, in that he holds his title as an officer of the court. It is therefore necessary to decide between two places of taxation: his domicile, and the jurisdiction of the appointing court. The domicile of a beneficiary is of course immaterial.[172]

For the reason indicated, the courts usually hold the situs of the estate to be in the court which appointed the executor or administrator who holds it; in case of principal administration, the domicile of the deceased,[173] and in case of ancillary administration the state of appointment,[174] even though the domicile of the executor or administrator is elsewhere.[175]

Under the Massachusetts statutes it appears to be held, contrary to the general rule, that the state of administration can tax the property only if the executor or administrator is domiciled there; if he is domiciled elsewhere, and the property is not actually situated within the state, it cannot be taxed.[176] It is not necessary, however, to invoke any peculiar doctrine of this nature to support the case of *Putnam* v. *Middleborough*.[177] In that case a Massachusetts decedent had left personal property both in Massachusetts and in California, and named as executor a resident of California, who was appointed both in Massachusetts and in California. He was held not taxable in Massachusetts on the California property. This conclusion must have been reached in any state, since the California property was held by the executor not by reason of any action of the Massachusetts court, but because of his ancillary appointment in California.

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[171] Swarts *v.* Hammer, 194 U. S. 441 (1904).

[172] Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164 (1886); Boske *v.* Security T. & S. V. Co. 22 Ky. L. Rep. 181, 56 S. W. 524 (1900); Tafel *v.* Lewis, 75 Ohio St. 182, 78 N. E. 1003 (1906).

[173] *In re* Miller, 116 Ia. 446, 90 N. W. 89 (1902); Commonwealth *v.* Peebles, 134 Ky. 121, 119 S. W. 774 (1909); Bonaparte *v.* State, 63 Md. 465 (1885); People *v.* Commissioners of Taxes, 38 Hun (N. Y.) 536 (1886); Tafel *v.* Lewis, 75 Ohio St. 182, 78 N. E. 1003 (1906).

[174] Dorris *v.* Miller, 105 Ia. 564, 75 N. W. 482 (1898); Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164 (1886); *In re* Thourot's Estate, 172 Pac. 697 (Utah) (1918).

[175] Gallup *v.* Schmidt, 154 Ind. 196, 56 N. E. 443 (1900); Bonaparte *v.* State, 63 Md. 465 (1885).

[176] Dallinger *v.* Rapello, 14 Fed. 32 (1882).

[177] 209 Mass. 456, 95 N. E. 749 (1911).

Suppose an administrator carries the property away from the state of his appointment into another state, may the property be taxed there? It has been held not;[178] and this decision seems correct, even in the case of tangible property. The administrator is answerable to his court for the disposition of the property, and for this reason it is submitted that the property would acquire no more than a temporary place in the state into which it is taken.

The case of the guardian is usually regarded as the same as that of the executor or administrator; property held by him is taxable in the state of his appointment, although he lives in another state and so does the ward.[179] In accordance with this principle it has been held that property of a resident ward in the hands of a foreign-appointed guardian is not taxable.[180] In Kentucky, however, it has been held that such property is taxable at the domicile of the ward, the beneficial owner.[181]

For the reasons already given in the case of the executor or administrator, property in the hands of a receiver is taxable in the court where the receiver holds it; the fact that it is in the control of the court protecting it from taxation no more in the one case than in the other, even though the court be a federal court, and the tax assessed by the state.[182] Thus where property formerly held by an ancillary receiver is transmitted to the principal receiver it is taxable in the state which appointed him, though there are many foreign distributees.[183]

Where there are joint owners of property, each is taxable for his interest; and the same thing is true of joint trustees.[184] If, however, there are joint trustees, some of them nonresidents, and the nonresidents have possession of the trust *res* outside the state, the resident trustee is not taxable on any part of the estate,

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[178] Weaver *v.* State, 110 Ia. 328, 81 N. W. 603 (1900).

[179] Baldwin *v.* Washington County, 85 Md. 145, 36 Atl. 764 (1897); Baldwin *v.* State, 89 Md. 587, 43 Atl. 857 (1899).

[180] Kinehart *v.* Howard, 90 Md. 1, 44 Atl. 1040 (1899).

[181] Boske *v.* Security T. & S. V. Co., 22 Ky. L. Rep. 181, 56 S. W. 524 (1900).

[182] Stevens *v.* New York & O. M. R. R., 13 Blatch. (U. S.) 104 (1875); *Ex parte* Chamberlain, 55 Fed. 704 (1893); Walters *v.* Western & A. R. R., 68 Fed. 1002 (1895); Hamilton *v.* David C. Beggs Co., 171 Fed. 157 (1909); Midland G. & T. Co. *v.* Douglas County, 217 Fed. 358 (1914); Coy *v.* Title G. & T. Co., 220 Fed. 90 (1915).

[183] Schmidt *v.* Failey, 148 Ind. 150, 47 N. E. 326 (1897).

[184] People *v.* Feitner, 168 N. Y. 360, 61 N. E. 1132 (1901).

at least in New York, where a domiciled owner is not taxable on absent property.[185]

An estate held by joint executors is taxable at the domicile of the deceased, though some of them are nonresidents.[186]

VII. Excise Tax

Not only persons and property may be taxed, but also the privilege of acting within the state, or of taking any benefit from the law of the state. In short, whatever the state may refuse or forbid, it may grant or allow only upon the payment of a fee to the state in return for the privilege: a license fee, or excise tax.[187]

In *People* v. *Reardon*[188] the state had laid a transfer tax upon the transfer within the state of shares in a foreign corporation belonging to a nonresident. The power of the state to tax was questioned, on the ground that neither the person nor the property was taxable by the state; the court, however, held the tax valid as a privilege tax. Judge Vann said:

"The tax, however, is not on property, but on the sale of property, or on a particular kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property. . . .

"Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. . . . Both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are

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[185] People *v.* Coleman, 119 N. Y. 137, 23 N. E. 488 (1890); People *v.* Barker, 135 N. Y. 656, 32 N. E. 252 (1892); People *v.* Tax Commissioners, 17 N. Y. Supp. 923 (1891).

[186] People *v.* Commissioners of Taxes, 38 Hun (N. Y.) 536 (1886); Hawk *v.* Bonn, 6 Ohio Circ. Ct. 452, 3 Ohio Circ. 535, December (1892).

[187] Nathan *v.* Louisiana, 8 How. (U. S.), 73 (1850); Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365 (1882); Williams *v.* Fears, 179 U. S. 270 (1900).

[188] 184 N. Y. 436, 449, 77 N. E. 970 (1906).

under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state."

Jurisdiction to exact a license fee, therefore, depends upon the place where the licensed act is done. Thus a license fee may be exacted from a foreigner for making a sale within the state;[189] for operating a railroad within the state;[190] or for using sleeping-cars within the state.[191] So an excise tax may be laid upon the payment of a dividend to a nonresident shareholder,[192] or upon the receipt of insurance premiums from residents of the state;[193] and such a tax may be laid upon the performance within the state of a contract of sale made in another state.[194]

Though the international jurisdiction of a state to levy an excise tax is complete, its exercise may often be limited by the Constitution of the United States.[195] A consideration of such limitations is, however, beyond the scope of the present article.

VIII. Inheritance Tax

One of the most important privileges granted by the law is that of succeeding to the property of a deceased person. Since at the moment before death the successor has no interest whatever in the property, and the moment after death an interest has vested in him, there must have been the creation or shifting of a legal interest, not the continuance of a preëxisting one; and this requires an act of the law. For furnishing this law of succession, the sovereign may levy an excise tax, or, as it is often called, a death duty.[196]

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[189] Harrison *v.* Vicksburg, 3 Sm. & M. (Miss.) 581 (1844); People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970 (1906).

[190] Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217 (1891).

[191] Pullman Southern Car Co. *v.* Gaines, 3 Tenn. Ch. 587 (1877).

[192] Oliver *v.* Washington Mills, 11 Allen (Mass.) 268 (1865).

[193] Equitable Life Society *v.* Pennsylvania, 238 U. S. 143 (1915).

[194] Shriver *v.* Pittsburg, 66 Pa. 446 (1870).

[195] See, for instance, Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 (1885); Sault Ste. Marie *v.* International Transit Co., 234 U. S. 333 (1914).

[196] Kochersperger *v.* Drake, 167 Ill. 122, 47 N. E. 321 (1897).

In England,[197] these taxes are of two sorts. There is a duty laid upon the succession, called in one act a legacy duty, in the later act a succession duty. There is also a duty laid upon the administration of the estate, called formerly a probate duty, and in the later act an estate duty.

In America, in general, there is no duty laid upon administration of estates; but the succession is very generally taxed, usually under the name of an inheritance tax, but sometimes, as in New York, under the name of a transfer tax.

The inheritance of land passes and can only pass in accordance with the law of the situs; and the sovereign of the situs alone performs a service for which an excise tax may be exacted. It is therefore universally held that no inheritance tax can be laid upon the transfer of land outside the territorial limits of the taxing state.[198] On all immovable property within the state the inheritance tax may be laid,[199] including equitable interests in such property.[200] In the case of mortgaged land, a tax may be laid upon the transfer of interest of either mortgagor or mortgagee, assessed at the value of the interest only.[201]

For the purpose of this discussion "land" means immovables, irrespective of the view taken of them by the land law of the situs; and includes a chattel real. Thus where an estate for joint lives in English land passed to the executor, upon the death of the foreign owner, legacy duty was held to be due upon it in England.[202]

Where a will directs that land be sold and the proceeds held as a trust fund, equity for some purposes regards the land as converted into personalty. Where a will contains such a direction as to foreign land, may the inheritance be taxed at the domicile,

[197] For an admirable monograph on the English law on this topic, see DICEY, CONFLICT OF LAWS, 2 ed., 746–71.

[198] Westerfeldt's Succession, 122 La. 836, 48 So. 281 (1909); *In re* Swift, 137 N. Y. 77, 32 N. E. 1096 (1893); Lorillard *v.* People, 6 Dem. (N. Y.) 268 (1887); Commonwealth *v.* Coleman, 52 Pa. 468 (1866); Drayton's Appeal, 61 Pa. 172 (1869); Bittinger's Estate, 129 Pa. 338, 18 Atl. 132 (1889).

[199] McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881 (1908); Matter of Burden, 47 Misc. 329, 95 N. Y. Supp. 972 (1905).

[200] Kinney *v.* Treasurer & Receiver General, 207 Mass. 368, 93 N. E. 586 (1911).

[201] McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881 (1908); Kinney *v.* Treasurer & Receiver General, 207 Mass. 368, 93 N. E. 586 (1911). But in Hatfield's Estate, 43 Pa. Co. Ct. 510 (1915), it was held that an inheritance tax cannot be levied on a mortgage of land within the state belonging to a nonresident.

[202] Chatfield *v.* Berchtoldt, L. R. 7 Ch. 192 (1872).

on the ground that as personalty it passes by the law of the domicile? In most jurisdictions it is held that no tax may be laid on the land; the reason usually given being that the doctrine of equitable conversion prevails only in equity, while the levying of a tax is a legal, not an equitable, process.[203] This reason is perhaps sufficient; but it would be enough to say that the doctrine of equitable conversion, though it treats the land as personalty, does not and cannot make it any the less immovable, and does not and cannot in any way affect its transfer by the law of the situs.

In Pennsylvania, however, a different view has been taken. The equitable conversion of foreign land of a Pennsylvania decedent by a direction that the executor sell and pay over the proceeds makes the inheritance taxable in Pennsylvania.[204] While a mere power given to the executor to sell the foreign land does not equitably convert it, so as to make it liable to tax at the domicile,[205] if the executor is directed to sell the land and out of the proceeds to pay debts or legacies, it is held that an inheritance tax may be exacted at the domicile of the decedent [206] unless it becomes unnecessary to exercise the power because the personal property is sufficient.[207] Conversely where such directions as to Pennsylvania land are given in a foreign will no inheritance tax can be collected in Pennsylvania.[208] No satisfactory reason for this exceptional doctrine has been offered.

Even in Pennsylvania this doctrine is confined to cases where the sale was directed for the payment of debts or legacies, or at least for some use within the state. When the will directed the executor to sell foreign land and invest the proceeds in another state, to be held as a trust fund, the court held that the transfer could not be taxed in Pennsylvania.[209]

[203] Connell *v.* Crosby, 210 Ill. 380, 71 N. E. 350 (1904); McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881 (1908); Matter of Swift, 137 N. Y. 77, 32 N. E. 1096 (1893).

[204] Miller's Estate, 182 Pa. 157, 37 Atl. 1000 (1897); Dalrymple's Estate, 215 Pa. 367, 64 Atl. 554 (1906).

[205] Drayton's Appeal, 61 Pa. 172 (1869).

[206] Miller *v.* Commonwealth, 111 Pa. 321, 2 Atl. 492 (1885); Williamson's Estate, 153 Pa. 508, 26 Atl. 246 (1893); Vanuxern's Estate, 212 Pa. 315, 61 Atl. 876 (1905).

[207] Marr's Estate, 240 Pa. 38, 87 Atl. 621 (1913); Crozer's Estate, 253 Pa. 15, 101 Atl. 801 (1916).

[208] *In re* Shoenberger, 221 Pa. 112, 70 Atl. 579 (1908); Lamberton's Estate, 40 Pa. Super. Ct. 548 (1909).

[209] Hale's Estate, 161 Pa. 181, 28 Atl. 1071 (1894)

In the case of inheritance from a partner, the transferred interest in land held by the firm is regarded as personalty; the inheritance is therefore taxable at the domicile of the deceased partner, although the land is in another jurisdiction.[210] This is not, properly speaking, a case of equitable conversion. The legal ownership of the land is really held on a dry trust for the unincorporated association; and the real interest of the partner is to an unascertained balance, which is in truth a personal interest.

It is within the power of a sovereign to tax the succession to chattels within his territory, and this is done by most of the inheritance tax laws in this country; the succession to chattels within the state is taxable although the deceased died domiciled elsewhere.[211] And this is true also of the English succession duty.[212] In order for the succession to pass by the law of the situs the property must be within the jurisdiction at the moment of the owner's death; property of a decedent domiciled abroad which is brought into the state and there, for whatever reason, given to the executor after the death cannot be taxed.[213]

The principles already examined as to the situs of things apply to the inheritance tax; thus bonds, notes, and deposits of money within the state, belonging to a foreign decedent, are taxable.[214] Stock in corporations chartered in the state,[215] and of national

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[210] Forbes *v.* Steven, L. R. 10 Eq. 178 (1870); *Re* Stokes, 62 L. T. R. 176 (1890).

[211] Western Assurance Co. *v.* Halliday, 127 Fed. 830 (1903); People *v.* Griffith, 245 Ill. 532, 92 N. E. 313 (1910); State *v.* Dalrymple, 70 Md. 294, 17 Atl. 82 (1889); Dixon *v.* Russell, 78 N. J. L. 296, 73 Atl. 51 (1909). See, however, under an earlier act, Neilson *v.* Russell, 76 N. J. L. 655, 71 Atl. 286 (1908); Matter of Swift, 137 N. Y. 77, 32 N. E. 1096 (1893); Matter of Romaine, 127 N. Y. 80, 27 N. E. 759 (1891). See, however, under an earlier act, Matter of Euston, 113 N. Y. 174, 21 N. E. 87 (1889); Matter of Embury, 19 App. Div. 214, 45 N. Y. Supp. 881 (1897); Alvany *v.* Powell, 2 Jones Eq. (55 N. C.) 51 (1854); *In re* Speers, 4 Ohio N. P. 238 (1897); Commonwealth *v.* Smith, 5 Pa. St. 142 (1847); Lewis's Estate, 203 Pa. 211, 52 Atl. 205 (1902). "Not a convincing authority." Brown, J., in Schoenberger's Estate, 221 Pa. 112, 70 Atl. 579 (1908).

[212] Attorney-General *v.* Campbell, L. R. 5 H. L. 524 (1872).

[213] McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881 (1908); Attorney-General *v.* Forbes, 2 Cl. & F. 48 (1834); Hay *v.* Fairlie, 1 Russ. 117 (1826); Arnold *v.* Arnold, 2 Myl. & Cr. 256 (1836).

[214] Hoyt *v.* Keegan, 167 N. W. 521 (Ia.) (1918); *In re* Rogers, 149 Mich. 305, 112 N. W. 931 (1907); Matter of Houdayer, 150 N. Y. 37, 44 N. E. 718 (1896); Matter of Burden, 47 N. Y. Misc. 329, 95 N. Y. Supp. 972 (1905).

[215] People *v.* Griffith, 245 Ill. 532, 92 N. E. 313 (1910); Greves *v.* Shaw, 173 Mass. 205, 53 N. E. 372 (1899); Gardiner *v.* Carter, 74 N. H. 507, 69 Atl. 939 (1908); Dixon

banks located in the state,[216] are taxable, though the decedent was nonresident; and a tax on a share of a deceased nonresident partner may be levied where the business was carried on, that being its business situs.[217] On the other hand, where a seat in the stock exchange is regarded as intangible property having a business situs, a seat in the New York exchange belonging to a nonresident who at the time of his death had ceased to carry on business in New York was held not taxable.[218] Stock in a foreign corporation, however, belonging to a nonresident decedent is not taxable, though the certificate was in the state at the owner's death.[219]

For this purpose a chose in action is regarded as situated with the creditor; and a debt due from a resident debtor to a nonresident decedent is therefore not subject to the inheritance tax.[220]

While the power to levy the tax at the situs of the property is clear, the legislature does not necessarily impose a tax which would lie upon all property within the jurisdiction. The English legacy duty (differing in this respect from the later succession duty) was held not to be payable out of property within the jurisdiction belonging to a nonresident decedent,[221] and the same interpretation has been placed upon the federal inheritance tax.[222]

While, as has been said, the sovereign of the situs has entire

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v. Russell, 78 N. J. L. 296, 73 Atl. 51 (1909); Matter of Bronson, 150 N. Y. 1, 44 N. E. 707 (1896); Matter of Fitch, 39 App. Div. 609, 57 N. Y. Supp. 786 (1899); Matter of Leavitt, 4 N. Y. Supp. 179 (1889); Small's Estate, 151 Pa. 1, 25 Atl. 23 (1892).

[216] Greves *v.* Shaw, 173 Mass. 205, 53 N. E. 372 (1899); Matter of Cushing, 40 N. Y. Misc. 505, 82 N. Y. Supp. 795 (1903).

[217] Stamp Duties Commissioner *v.* Salting, [1907] A. C. 449.

[218] *In re* Ogden's Estate (Misc.), 170 N. Y. Supp. 630 (1918).

[219] Matter of James, 144 N. Y. 6, 38 N. E. 961 (1894); and see People *v.* Griffith, 245 Ill. 532, 92 N. E. 313 (1910).

[220] Allen *v.* Philadelphia Sav. Fund Soc., 1 Fed. Cas. 234, 14 Phila. 408, 7 W. N. C. 231 (1879); Kintzing *v.* Hutchinson, Fed. Cas. No. 7,834, 7 W. N. C. 226 (1877); Gilbertson *v.* Oliver, 129 Ia. 568, 105 N. W. 1002 (1906); Matter of Gordon, 186 N. Y. 471, 79 N. E. 722 (1906); Matter of Horn, 39 N. Y. Misc. 133, 78 N. Y. Supp. 979 (1902); Orcutt's Appeal, 97 Pa. 179 (1881); Del Busto's Estate, 6 Pa. Co. Ct. 289 (1888). See, however, Alexander's Estate, 3 Clark (Pa.), 87, 4 Pa. L. J. 448 (1845). *Contra, In re* Commercial Bank, L. R. 5 Ch. 314 (1870); Attorney-General *v.* Newman, 1 Ont. L. R. 511 (1901).

[221] Thomson *v.* Advocate-General, 12 Cl. & F. 1 (1842); Wallace *v.* Attorney-General, L. R. 1 Ch. 1 (1865); *In re* Bruce, 2 Cr. & J. 436 (1832).

[222] Eidman *v.* Martinez, 184 U. S. 578 (1902); Ruckgaber *v.* Moore, 104 Fed. 947 (1900).

control over personal property as well as land there, and extends the privilege of succession to it, nevertheless, as will be seen, almost every common-law state does in fact regulate the succession of personal property situated within it by the rules of succession which prevail at the domicile of the decedent. The sovereign of the domicile, therefore, as well as the sovereign of situs extends to the successor the privilege of taking the property, since in order to take he must secure a provision to that effect in the laws of the domicile. As was said by Mr. Justice Holmes in *Bullen* v. *Wisconsin:* [223]

"The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession it would be recognized that by the traditions of our law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona* of the deceased. As the States where the property is situated, if governed by the common law, generally recognize the law of the domicile as determining the succession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicile."

It follows that the succession to all personal property, wherever situated, may be taxed at the domicile of the decedent; [224] and this is usually done.[225] This includes the taxation there of all debts due to the deceased, even those secured by mortgage of foreign land.[226]

In a few states it is held that the act does not extend to the taxation of foreign chattels; the operation of the act being re-

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[223] 240 U. S. 625, 631 (1916).

[224] Keeney *v.* New York, 222 U. S. 525 (1912).

[225] Carpenter *v.* Pennsylvania, 17 How. (U. S.) 456 (1854); Eidman *v.* Martinez, 184 U. S. 578 (1902); Gallup's Appeal, 76 Conn. 617, 57 Atl. 699 (1904); Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657 (1905); Frothingham *v.* Shaw, 175 Mass. 59, 55 N. E. 623 (1899); Mann *v.* Carter, 74 N. H. 345, 68 Atl. 130 (1907); Hartman's Case, 70 N. J. Eq. 664, 62 Atl. 560 (1905); Matter of Swift, 137 N. Y. 77, 32 N. E. 1096 (1893); Matter of Merriam, 141 N. Y. 479, 36 N. E. 505 (1894); Matter of Dingman, 66 App. Div. 228, 72 N. Y. Supp. 694 (1901); *In re* Short's Estate, 16 Pa. 63 (1851); Stanton's Estate, 3 Pa. Dist. 371 (1894); Estate of Bullen, 143 Wis. 512, 128 N. W. 109 (1910); *In re* Ewin, 1 Cr. & J. 151 (1830); *In re* Coales, 7 M. & W. 390 (1841); Attorney-General *v.* Napier, 6 Ex. 217 (1851).

[226] Matter of Corning, 3 N. Y. Misc. 160, 23 N. Y. Supp. 285 (1893); Stanton's Estate, 3 Pa. Dist. 371 (1894); *In re* Howard, 80 Vt. 489, 68 Atl. 513 (1907).

stricted to the chattels of the deceased resident situated within the state, together with his intangible property.[227]

Whatever view may be taken of a transfer by inheritance, other kinds of taxable transfers cannot be taxed outside the state of situs. Thus, a transfer by a gift *causa mortis*, which is commonly covered by an inheritance tax law, is governed, as will be seen, by the law of the situs; and there is no possible ground for taxing the transfer at the domicile of the decedent. The same thing would be true in the case of an appointment by will under a power which derives no force from the inheritance law of the person exercising the power. Thus in *Matter of Fearing*,[228] where a power of appointment over property outside New York was exercised by a New York will, the appointment was held not to be taxable in New York. In that case the power was created in a New York will, and the transfer under that will might therefore have been taxable in New York but for the fact that the creation of the power antedated the first inheritance tax law.

It would seem that a tax could not be imposed at the domicile upon chattels situated in a state which does not accept the common-law doctrine, but disposes of all chattels situated in the state, upon the death of the owner, according to its own inheritance laws. As to such chattels the law of the domicile grants no privilege to the successor, and it must therefore be beyond the power of the domicile to exact a tax from him.

This principle was applied in a slightly different case. In *Matter of Cummings* [229] a decedent left personal property in New York and in California. The California court of probate found the deceased domiciled in that state, and distributed the assets found there according to the California law. The New York court found that the deceased died domiciled in New York; but in assessing the New York inheritance tax it was held that the California assets could not be included. The reason is obvious; that in obtaining those assets the distributees had derived no help from the law of New York.

Since an inheritance tax may be laid upon all tangible and much

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[227] Weaver *v.* State, 110 Ia. 328, 81 N. W. 603 (1900); State *v.* Brevard, Phil. Eq. (62 N. C.) 141 (1867); *Re* Joyslin, 76 Vt. 88, 56 Atl. 281 (1903).

[228] 200 N. Y. 340, 90 N. E. 956 (1911).

[229] 63 N. Y. Misc. 621, 118 N. Y. Supp. 684 (1909).

intangible property in two states, the result is a double burden of taxation; to which is now added an additional federal tax. This triple burden is, however, quite within the law.[230] The burden is often ameliorated by allowing a deduction of debts and of other taxes, and by a marshalling of assets so as to diminish one of the taxes; but such provisions are beyond the scope of this article.[231]

A state which is neither the domicile of the decedent nor the situs of any of his property extends no privilege to the successor, and cannot tax the succession.[232]

It has already been seen that an estate under administration is situated in the court by which it is being administered. If a beneficiary of such an estate should die pending its administration, an inheritance tax upon his succession is leviable in the state where the estate is being administered; [233] and on the other hand such a tax is not assessable at the domicile of the decedent beneficiary,[234] except in a state which lays the tax upon the foreign property of a domiciled decedent.[235] Nor will the presence of *bona notabilia* within a state suffice to support a tax on the succession to a legatee; for the interest of the beneficiary of the estate is not an interest in specific chattels, but in the distribution of the balance after the payment of debts and charges.[236]

Where a trust estate has its situs within a certain jurisdiction, and a beneficial interest in the estate is transferred at the death of an owner of it, an inheritance tax is payable at the place of administration of the trust.[237] To use the language of Jessel, M. R.,

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[230] Frothingham *v.* Shaw, 175 Mass. 59, 55 N. E. 623 (1899).

[231] For examples of such proceedings, see Tilford *v.* Dickinson, 79 N. J. L. 302, 75 Atl. 574 (1910); Matter of Ramsdill, 190 N. Y. 492, 83 N. E. 584 (1908); Matter of McEwan, 51 N. Y. Misc. 455, 101 N. Y. Supp. 733 (1906); Matter of Grosvenor, 124 App. Div. 331, 108 N. Y. Supp. 926 (1908).

[232] Matter of Bentley, 31 N. Y. Misc. 656, 66 N. Y. Supp. 95 (1900); Matter of Bishop, 82 App. Div. 112, 81 N. Y. Supp. 474 (1903); Matter of Hillman, 116 App. Div. 186, 101 N. Y. Supp. 640 (1906); State *v.* Brim, 4 Jones Eq. (57 N. C.) 300 (1858); Hood's Estate, 21 Pa. 106 (1853).

[233] Matter of Clinch, 180 N. Y. 300, 73 N. E. 35 (1905); Weaver's Estate, 4 Pa. Dist. 260 (1895).

[234] Matter of Thomas, 3 N. Y. Misc. 388, 24 N. Y. Supp. 713 (1893).

[235] Milliken's Estate, 206 Pa. 149, 55 Atl. 853 (1903).

[236] Matter of Lord, 111 App. Div. 152, 97 N. Y. Supp. 553 (1906), affirmed 186 N. Y. 549, 79 N. E. 1110 (1906); Lyall *v.* Lyall, L. R. 15 Eq. 1 (1872).

[237] Matter of Lord, 111 App. Div. 152, 97 N. Y. Supp. 553 (1906), affirmed 186 N. Y. 549, 79 N. E. 1110 (1906); Commonwealth *v.* Kuhn, 18 Phila. 403, 2 Pa. Co. Ct.

in *In re Cigala*,[238] this is because "you cannot get it . . . except by an action in England. That is the true test; in order to recover the property you must come to England." The proper place to claim an interest in trust property is at the seat of the trust. Just what is meant by the seat of the trust cannot here be considered. It is not necessarily the domicile of the trustee.[239]

That the interest in the trust fund was transferred as the result of the exercise of a power of appointment does not alter the case; the transfer is taxable at the seat of the trust.[240]

In a state which levies an inheritance at the domicile of the decedent upon all personal property, the interest of a domiciled decedent in a foreign trust fund is of course taxable.[241]

The British probate duty was levied upon all property which should come to an English court to be administered. The right of administration depends upon the situation of the property within the jurisdiction at the moment of the decedent's death; no probate duty could be levied upon property brought into the jurisdiction after the death, even though it was brought in to be administered there.[242] Probate duty was, however, due on everything within the jurisdiction at the death of the decedent which should be administered there. This covers not only ordinary chattels, but bonds of foreign governments [243] and certificates of stock in foreign corporations,[244] since they are marketable securities within the kingdom, transferable there; shares in English companies;[245] and an undivided share in the residue of an English estate not yet administered, though that estate consisted largely of foreign property.[246] Furthermore, since administration may be granted

248 (1886); Attorney-General *v.* Campbell, L. R. 5 H. L. 524 (1872); *In re* Cigala, 7 Ch. D. 351 (1878); *In re* Badart's Trusts, L. R. 10 Eq. 288 (1870); Lyall *v.* Lyall, L. R. 15 Eq. 1 (1872); *Re* Smith's Trusts, 10 L. T. R. 598 (1864).

[238] 7 Ch. D. 351 (1878).

[239] Douglas County *v.* Kountze, 84 Neb. 506, 121 N. W. 593 (1909).

[240] Matter of Lord, 111 App. Div. 152, 97 N. Y. Supp. 553 (1906), affirmed 186 N. Y. 549, 79 N. E. 1110 (1906); *Re* Wallop's Trusts, 1 De G., J. & S. 656 (1864); *In re* Lovelace, 4 De G. & J. 340 (1859).

[241] Lines's Estate, 155 Pa. 378, 26 Atl. 728 (1893).

[242] Attorney-General *v.* Hope, 2 Cl. & F. 84 (1834); Attorney-General *v.* Dimond, 1 Cr. & J. 356 (1831).

[243] Attorney-General *v.* Bouwens, 4 M. & W. 171 (1838).

[244] Stern *v.* Queen, [1896] 1 Q. B. 211.

[245] New York Breweries Co. *v.* Attorney-General, [1899] A. C. 62.

[246] Sudeley *v.* Attorney-General, [1897] A. C. 11.

at the domicile of a debtor to the deceased, probate duty is due if a debtor to the deceased is domiciled within the kingdom.[247]

The British Estate Duty, created by a later act, covers all cases where a probate duty may be exacted, and other cases where a succession duty may be levied. In its former quality its jurisdiction is identical with that of the probate duty.

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[247] Commissioners of Stamps v. Hope, [1891] A. C. 476.